CLERK'S COPY.
114
5762
L. C.
Y

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 68

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-FIRST DISTRICT OF NEW YORK, PETITIONER

vs.

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 19, 1929
CERTIORARI GRANTED MAY 13, 1929

(34156)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 68

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-FIRST DISTRICT OF NEW YORK, PETITIONER

vs.

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from D. C. U. S., Northern New York	1	1
Writ of error	1	1
Summons and marshal's return	3	2
Amended complaint	4	2
Schedule "A"—Letter rejecting claim for refund	24	12
Schedule "B"—List of outside properties and real estate	26	13
Amended answer	28	13
Answer to second amended complaint	41	20
Minute entry	45	21
Order of reference	46	22
Statement of evidence before referee	48	22
Oath of referee	48	22
Colloquy between court and counsel	49	23
Statement of case	50	23
Motion to dismiss	65	31
Colloquy between court and counsel	76	37

	Original	Print
Record from D. C. U. S., Northern New York—Continued.		
Statement of evidence before referee—Continued.		
Plaintiff's Exhibit 3—Certificate of Secretary of State	86	43
Testimony of Frank C. Biehler	89	44
Plaintiff's Exhibit 7—Notice of rejection	144	77
Plaintiff's Exhibit 8—Taxpayer's receipt	171	91
Plaintiff's Exhibit 9—Notice of protest	172	92
Testimony of Frank J. Webb	185	99
Frank C. Biehler (recalled)	188	101
Carl W. Siebeneichen	196	107
George J. Gannon	230	126
Plaintiff's Exhibit 19—Certificate re trade-marks	245	135
Testimony of Clinton S. Carr	247	136
Cornelius J. Nugent	256	141
William E. Sembach	258	142
John J. Zahn	265	147
Frank C. Biehler (recalled)	276	153
Defendant's Exhibit 2—Excerpt from city directory	285	159
Testimony of Carl W. Siebeneichen (recalled)	293	163
Defendant's Exhibit 3—Computation	300	168
Colloquy between court and counsel	304	170
Testimony of Frank C. Biehler (recalled)	318	177
Morris F. Tanner	321	179
Daniel C. Webster	335	187
Frank C. Biehler (recalled)	342	191
Motions to dismiss	344	192
Colloquy between court and counsel	348	195
Stipulation re bill of exceptions	352	197
Order settling bill of exceptions	353	197
Petition for writ of error	355	198
Assignments of error	360	200
Stipulation re referee	361	200
Order of reference	363	201
Findings and conclusions of referee	365	202
Plaintiff's exceptions to findings and conclusions	393	216
Order denying motion for judgment	396	218
Judgment	398	219
Plaintiff's objections to granting of judgment	400	220
Notice of exceptions to findings, etc	403	221
Opinion of referee	408	224
Opinion, Cooper, J., on motion for judgment	427	234
Bond on writ of error [omitted in printing]	434	237
Citation and service [omitted in printing]	440	237
Order extending term	441	237
Order extending time	443	238
Defendant's exceptions to referee's findings	445	239
Defendant's requested findings and conclusions	466	250
Plaintiff's Exhibit 2—Certificate of incorporation	477	256

cord from D. C. U. S., Northern New York—Continued.	Original	Print
Statements re plaintiff's Exhibits 4 and 5	481	258
Plaintiff's Exhibit 6—Assignment and power of attorney over liquor tax certificates	481	258
Plaintiff's Exhibit 10—Auditor's report from June 1, 1907, to May 31, 1919, inclusive	493	265
Plaintiff's Exhibit 11—Balance sheet as of May 31, 1920	541	289
Plaintiff's Exhibit 12—Computation showing analysis of earnings	547	290
Plaintiff's Exhibit 13—Computation, showing analysis of real estate, fixtures, etc	550	294
Statements re plaintiff's Exhibits 14 to 18, inclusive	562	301
Statement re defendant's Exhibit 1	564	302
Stipulation re transcript of record	565	302
Clerk's certificate [omitted in printing]	566	303
ceedings in U. S. C. C. A., Second Circuit	568	303
nion, Swan, J	568	303
ree	572	309
k's certificate [omitted in printing]	574	310
er allowing certiorari	575	310

1 In United States District Court, Northern New York

Writ of error

Filed Jan. 20, 1928

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the District Court of the United States for the Northern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said district court before you or some of you, between the Haberle Crystal Springs Brewing Company, plaintiff, and Jesse W. Clarke, collector of internal revenue for the 21st district, New York, as defendant, manifest errors have happened to the great damage of the said the Haberle Crystal Springs Brewing Company, as it is said and appears by the petition herein:

We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given,
2 that then under your seal, distinctly and openly, do send the record and proceedings aforesaid with all things concerning the same, to the judges of the United States Circuit Court of Appeals for thesecond judicial district at the court room of said court in the post-office building in the Borough of Manhattan, city of New York, State of New York, together with this writ, so that you have the same at said place before the judges aforesaid within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said judges of the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the honorable William Howard Taft, Chief Justice of the United States this 14th day of January in the year of our Lord one thousand nine hundred and twenty-eight and of the independence of the United States the one hundred fifty-second year.

[SEAL.] JOHN W. HAHN,
Clerk of the District Court of the United States for the Northern District of New York.

The foregoing writ of error is hereby allowed.

FRANK COOPER,
United States District Judge.

[File endorsement omitted.]

3 United States District Court—Northern District of New York

No. 858

The Haberle-Crystal Spring Brewing Company, plaintiff, against Jesse W. Clark, collector of internal revenue for the 21st district, New York, defendant.

Summons and marshal's return

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the honorable Frank Cooper, judge of the said court, at the city of Utica, in the said northern district of New York,
4 the 11th day of August, in the year of our Lord one thousand nine hundred and twenty-three.

[SEAL.] C. W. HIGGINSON, *Clerk.*
WELCH & WELCH,
Plaintiff's Attorneys.

Office and post-office address, 706 City Bank Bldg., Syracuse, New York.

(Endorsed:) Served August 13, 1923, James Steel, dep. marshal.

In United States District Court

[Title omitted.]

Amended Complaint

Plaintiff above named, complaining of the defendant above named, and for an amended complaint herein, alleges and shows to the court:

5 First. That at all the time and times herein mentioned said defendant was and is the duly appointed, acting, and qualified collector of internal revenue for the 21st district, New York, with his office for the transaction of business in the city of Syracuse, N. Y.

Second. That said plaintiff was a domestic corporation, organized under the laws of the State of New York, and commenced business

in the year 1892, and had its principal office for the transaction of business at the said city of Syracuse since May, 1892, and during that time was engaged in the brewing business and was engaged in the manufacture and sale of lager beer and ale, until on and after October 28, 1919, when said business was prohibited by the passage of the so-called Volstead Act; and on or about December 31, 1920, said plaintiff went into actual voluntary dissolution and liquidation and its assets have been practically all liquidated and distributed as provided by the laws and statutes of the State of New York, except its claim of refund against said defendant hereinafter stated, and said plaintiff is duly and legally authorized to bring this action and is legally capable of suing and of being sued upon claims or demands existing in favor of or against it.

Third. Plaintiff further alleges that from said May, 1892, up to August 10, 1917, it was extensively engaged in the manufacture and sale of lager beer and ale which contained alcoholic con-
6 tents of more than four per cent, and its products were extensively sold, known, and advertised in the trade as "Congress Beer" and "Derby Cream Ale," and that during said period of time said plaintiff, relying upon its privilege and right to continue in business, and for the purpose of building up its trade and good will, purchased many pieces of real estate in the city of Syracuse, and elsewhere, and became the owner of such real estate.

Fourth. That in the year 1917 an act of Congress was passed by the Sixty-fifth Congress and approved by the President of the United States on August 10, 1917, and thereafter became operative, effective, and enforcible against said plaintiff, which act was known as the emergency food survey, and that the said act restrained said plaintiff from continuing and carrying on its business as it had theretofore by restriction of the alcoholic content which might be used in the manufacture of the products of the said plaintiff.

Fifth. That the eighteenth amendment to the Constitution of the United States was adopted on or about January 17, 1919, and became operative and effective on or about January 17, 1920, which said amendment prohibited said plaintiff from the manufacture, sale, or transportation of the intoxicating liquors theretofore manufactured and sold by it and especially its said product known as "Congress Beer" and "Derby Cream Ale."

7 Sixth. That on or about October 28, 1919, said Congress passed an act which went into effect and became operative immediately and has since been in full force, commonly known and called the Volstead Act, which act prohibited and restrained said plaintiff from manufacturing and selling its said lager beer and ale

and prohibited said plaintiff from making and selling liquid drinks containing more than one-half of one per cent of alcoholic contents by volume and prohibited and restrained said plaintiff from advertising or using the words "beer," "ale," "lager beer," "Congress Beer," or "Derby Cream Ale," in the manufacture and sale of its products or in carrying on its business as it had previously done, which said "Congress Beer" and "Derby Cream Ale" were trade names used by said plaintiff in its business and trade.

Seventh. That said Congress passed an act which went into effect and became operative, which prohibited said plaintiff from making beer or ale containing alcoholic contents in excess of 2.75 per cent by volume, which continued until about October 29, 1919.

Eighth. All of which acts and rules and regulations applicable thereto are hereby referred to and made a part of this complaint, and are herein pleaded, all of which acts, rules, and regulations were and are binding on said plaintiff and restrained plaintiff from the carrying on of its lawful business so originally established and so carries on.

8 Ninth. Plaintiff further alleges that for some years prior to the year 1918, plaintiff's accounting period closed on the 31st day of May in each year.

Tenth. Plaintiff further alleges on information and belief that under acts of Congress of the United States, and the rules and regulations of its departments, said plaintiff was required to make and file an income, excess, and war profits tax return for its fiscal year ending May 31st, 1918, which return would become due on August 15, 1918, and that said plaintiff, as required thereby, and for its fiscal year ending May 31, 1918, make and file the required return, and that it paid the tax indicated thereby, amounting to two thousand four hundred fifty-two dollars and twenty-two cents ($2,452.22), which return was correct and just according to the records of said plaintiff, but that thereafter a verification of the said return was made by officers of the Bureau of Internal Revenue, and as a result of said verification said plaintiff paid an additional sum of eight thousand one hundred and twenty-six dollars and twenty-five cents ($8,126.25), making in all for the year 1918 the sum of ten thousand five hundred seventy-eight dollars and forty-seven cents ($10,578.47), and that as required by said acts, rules, and regulations, said plaintiff made and filed a similar return for the year ending May 31, 1919, which would

9 become due on August 15, 1919, and that said plaintiff, as required thereby, did for its fiscal year ending May 31, 1919, make and file the required return, and that it paid the tax indicated thereby, amounting to eleven thousand eighty-seven dollars and two cents ($11,087.02), which said return was correct and just according

to the records of said plaintiff, and that subsequent to the filing of said return for said fiscal year ending May 31, 1919, upon a preliminary audit of the said return made by officers of the Bureau of Internal Revenue, an additional tax of seventeen thousand two hundred eighty-three dollars and thirty cents ($17,283.30) was erroneously and unlawfully assessed against said plaintiff, which said sum of seventeen thousand two hundred eighty-three dollars and thirty cents ($17,283.30), with one thousand two hundred and nine dollars and eighty-three cents ($1,209.83) interest and penalty, amounted to eighteen thousand four hundred and ninety-three dollars and thirteen cents ($18,493.13), which said sum said plaintiff paid under protest and duress to said defendant on or about July 8, 1922.

Eleventh. That the said sum of eighteen thousand four hundred ninety-three dollars and thirteen cents ($18,493.13) was paid by said plaintiff to said defendant under protest and duress, and the same was unlawfully and erroneously assessed and levied and was erroneously and unlawfully received and collected by said defendant.

10 Twelfth. Plaintiff further alleges upon information and belief that upon the demand being made by said defendant for the payment of the said sum of seventeen thousand two hundred eighty-three dollars and thirty cents ($17,283.30) said plaintiff filed a claim in abatement therefor, and submitted data in support of said claim, which said claim was rejected by the Bureau of Internal Revenue, and thereupon added to said sum of seventeen thousand two hundred eighty-three dollars and thirty cents ($17,283.30) said sum of one thousand two hundred and nine dollars and eighty-three cents ($1,209.83) interest and penalty aforesaid, which was thereupon paid by said plaintiff as aforesaid under duress and protest, on the demand of said defendant.

Thirteenth. Plaintiff further alleges that immediately after the payment of said sum of eighteen thousand four hundred and ninety-three dollars and thirteen cents ($18,493.13) under protest and duress as aforesaid, said plaintiff filed with said defendant a claim for refund for said eighteen thousand four hundred ninety-three dollars and thirteen cents ($18,493.13) and including five hundred sixty-nine dollars and eighty-two cents ($569.82) as a counterclaim against the year 1918, making in all nineteen thousand and sixty-two dollars and ninety-five cents ($19,062.95), as provided by law and the rules

11 and regulations of the Treasury Department and the Bureau of Internal Revenue, which claim for refund set up, and also as an offset and counterclaim, loss sustained through the obsolescences and obsolescence of the good will, and the loss of the use and useful value of the trade names and trade brands of the plaintiff connected with and which was a part of its business and property and assets,

and such good will, and trade names, trade brands, etc., was and had a substantial value, and the same was a transferable asset.

Fourteenth. Plaintiff further alleges that said tax and penalty amounting to nineteen thousand and sixty-two dollars and ninety-five cents ($19,062.95) was erroneously and unlawfully assessed against said plaintiff by said Bureau of Internal Revenue in addition to the tax indicated by said returns filed by said plaintiff and was primarily due to a disallowance of a part of the depreciation and obsolescence taken therein, said disallowance of depreciation and obsolescence amounting to ninety-eight thousand, seven hundred ninety dollars and forty-eight cents ($98,790.48) on outside real estate, good will, and intangible assets owned by said plaintiff, and that said disallowance was erroneously, unlawfully, and arbitrarily made, contrary to the facts and the value thereof, and that said disallowance should not have been made.

12 Fifteenth. The revenue act of 1918 was passed by Congress and became effective and sub. 8 of sec. 214 provided that in computing net income there should be allowed as deductions "a reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence." The revenue act of 1921 passed by Congress and became operative added to the above section "In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913."

Sixteenth. Said plaintiff was advised when it made its said returns for 1918 and 1919 that it could not make claim therein for allowance for its obsolescences and obsolescence of good will of its business until the end of its useful life, and plaintiff alleges on information and belief that this was the holding and ruling of the Treasury Department and the United States Commissioner of Internal Revenue and especially by article 161 of their regulations.

Seventeenth. That after the filing of said returns by said plaintiff for the said years of 1918 and 1919 said Treasury Department and United States Commissioner of Internal Revenue held and made rulings that claims for deductions for obsolescence and obsolescences of good will of distillers and brewers should be distributed

13 covering the period extending from January 31, 1918 to January 16, 1920 the time when the 18th amendment became effective.

Eighteenth. That the deduction claimed by said plaintiff in its said return filed in 1919 on its outside properties as it appears by Schedule "B" hereto annexed and made a part hereof was $133,538.63 on account of prohibition and the sum of $24,755.15 was allowed for exhaustion, wear and tear of the property used, but

that nothing was deducted or allowed for obsolescences or obsolescence of good will, thereby disallowing about $98,783.48 of said plaintiff's return making a tax thereon of $17,283.30 which plaintiff had to pay, but under protest as herein alleged. That when demand of payment was made by said defendant, said plaintiff filed a claim for abatement for said sum of $17,283.30 and a claim for refund for $569.82 on account of its 1918 report and rejections relating thereto.

Nineteenth. That plaintiff claim for refund herein was filed on or about November 19, 1922, and from this report it appears that said plaintiff paid, for the years 1918 and 1919, $17,853.12 erroneously collected, with $1,209.83 interest and penalty, in all, $19,062.95, which claim for refund is hereby referred to and made a part hereof, which said claim for refund sets up a counterclaim to said amounts so erroneously collected and plaintiff therein claims a refund
14 to that amount on account of a reasonable allowance for obsolescences and obsolescence and loss of good will covering the period of time and the distribution period as provided for therein.

Twentieth. Plaintiff alleges on information and belief its New York State liquor tax certificate, trade names, trade brands, and good will and other intangible assets were on March 1, 1913, prior thereto and continued thereafter up to the year 1918 to be reasonably worth in excess of $200,000.00 and the same was wholly destroyed including its National Brewery plant and equipment thereof, on Burnet Avenue, which became practically worthless on the passage of said Volstead Act and by reason of the 18th amendment to the Constitution and that plaintiff should have allowance of deduction therefor.

Twenty-first. That said plaintiff on its incorporation took over the Haberle Brewery and the Crystal Spring Brewery upon its incorporation and later took over the National Brewery and the Kearney Brewery. That from the time of its incorporation up to October 28, 1919, it manufactured lager beer with an alcoholic content of about 4 per cent by volume and ale with an alcoholic content of about 4½ per cent by volume. It was made from the best materials, carefully brewed and scientifically aged and it had a thoroughly established reputation in Onondaga County and central New York.

The beer was sold, advertised and known in the trade as
15 "Congress Beer" and the ale was sold, advertised and known in the trade as "Derby Cream Ale." Those two names were trade names of the plaintiff and plaintiff's beer and ale was sold, called for and purchased by its trade name and not by plaintiff's name.

Twenty-second. Said plaintiff's business continued to develop from the time of its incorporation and through many years of dealing with

the public plaintiff developed a very valuable good will in connection with the manufacture and sale of its beer and ale. It acquired and purchased outside properties which furnished an outlet for the sale of its products, did much advertising, established many agencies throughout central New York and sold most of its product in the barrel, expanded and added units to its plant and capacity to its output and "Congress Beer" and "Derby Cream Ale" were extensively used and known in the trade and by the public.

Twenty-third. Under the laws and statutes of the State of New York from 1892 to October 28, 1919, the retail and wholesale dealers in the sale of beer and ale containing more than ½ to 1% of alcohol had to have liquor tax certificates issued through the excise department of New York State in order to engage in the traffic and the plaintiff had from the time of its incorporation to October 28, 1919, and had on March 1, 1913, and continued to have until said October 28, 1919, assignments of or power of attorneys
16 over and controlled a great number of liquor tax certificates at a great cost and expense and were of a great value to plaintiff in protecting, procuring, and extending its trade and during a great portion of this time the number of liquor tax certificates issued were restricted and limited and to procure them for a new place required certain written consents of the neighboring residents consenting thereto which gave such certificates a great value and plaintiff alleges on information and belief that the value of said liquor tax certificates held or controlled by said plaintiff was on March 1, 1913, of the value of more than $100,000.00 and so continued to increase and would have been of the value of more than $200,000.00 on October 28, 1919, had said Volstead Act not been passed.

Twenty-fourth. That the outside properties owned by said plaintiff and described in Schedule "B" annexed to plaintiff's complaint had attached to each piece a liquor tax certificate and the same cost and were of great value to the same and to plaintiff.

Twenty-fifth. That said plaintiff had the exclusive sale of their said "Congress Beer" and "Derby Cream Ale" under all of said liquor tax certificates and at the several premises and places for which they were issued and for which the right to apply for and receive same were attached and said plaintiff had the right under its agreements and powers of attorney to surrender them and
17 to transfer the same to other premises and to have new or renewals of each of them issued and reissued to such persons or places as plaintiff might see fit or desire and they and each of them and plaintiff rights therein and to control same were of great value.

Twenty-sixth. That on the passage of said Volstead Act and the taking effect of the 18th amendment to the Constitution plaintiff's said business, trade, products, trade names, liquor tax certificates and

plaintiff's said rights therein and good will was wholly and totally destroyed and became thereupon obsolescences for which plaintiff should have a reasonable deduction.

Twenty-seventh. That said trade names, business, liquor tax certificates and the right to control the same and the trade thereunder and good will so owned by plaintiff were of great value, were assignable and transferable and the same became obsolescences and totally destroyed on the passage of said Volstead Act and that taking effect of the 18th amendment.

Twenty-eighth. That up to the time of the passage of said Volstead Act said plaintiff paid to the United States Government, through said defendant and its Treasury Department all the necessary taxes and license fees to entitle it to lawfully carry on its business amounting to several million of dollars.

18 Twenty-ninth. That said plaintiff had enjoyed, prior to Oct. 28, 1919, a profitable and remunerative business, that said business had depended largely upon the ownership and use of the trade names, trade brands, and good will which it had built up and used in the conduct of its business and in the ownership and control of the properties and liquor tax certificates which were necessary to a proper and profitable marketing of its products; that by the enactment of the Volstead Act the manufacture of its product had been prohibited, the use of its trade names and trade brands had been restrained, and the value attaching to its outside properties including its National Brewery Plant and equipment and liquor tax certificates for use in marketing its products had been destroyed, and that since the passage of said act the plaintiff had not enjoyed the use of the trade names, trade brands, liquor tax certificate rights and privileges and good will, had not continued in the manufacture of the product for which it was organized, had largely lost the valuable use of its outside properties including its National Brewery Plant and equipment which it had acquired and had taken prompt steps to discontinuing all manufacturing activities and to dissolve.

Thirtieth. That since the year 1918 and including the year of 1919, said plaintiff and its officers contemplated a dissolution of said plaintiff and a distribution of its assets among its stockholders,

19 and that on the 21st day of July, 1920, its board of directors duly passed a resolution to dissolve the corporation, and on September 20, 1920, at a stockholders' meeting held on that day, an agreement in writing was made by the stockholders for a voluntary dissolution, and on December 23, 1920, said agreement of dissolution was filed with the secretary of state and on the 21st day of December, 1920, said plaintiff went into voluntary dissolution, as provided by the laws of the State of New York, and distributed its assets, except its said claim herein.

Thirty-first. That said claim for refund of nineteen thousand and sixty-two dollars and ninety-five cents ($19,062.95) filed as aforesaid, was rejected and disallowed on or about July 16, 1923, and a notice thereof in writing of J. G. Bright, deputy commissioner, by F. R. Chute, head of division, was on said last mentioned date given said plaintiff a copy of which said notice is hereto annexed, marked Schedule "A," and the same is hereby referred to and made a part of this complaint.

Thirty-second. That said returns for the fiscal years of 1918 and 1919, said additional assessments, said claim in abatement and said claim for refund are now on file in the Bureau of Internal Revenue at Washington, D. C., and are under the control and supervision of the Commissioner of Internal Revenue of the United States,
20 and are hereby referred to and made a part of this complaint.

Thirty-third. That said sum of nineteen thousand and Sixty-two dollars and ninety-five cents ($19,062.95) so paid under protest and duress by said plaintiff to said defendant, on or about July 8, 1922, was erroneously, unlawfully and illegally assessed and collected without authority, and the same was excessive and was wrongfully and illegally collected.

Thirty-fourth. That Schedule "B" hereto annexed contains a list of the outside properties and real estate on which said plaintiff claimed deductions in its said returns, and opposite each parcel is the amount claimed and the reason therefor, and also the amounts of deductions allowed on each parcel by the Commissioner of Internal Revenue, there being a difference between the amount so claimed and the amount allowed of $98,790.48 which said Schedule "B" is hereby referred to and the same forms a part of this complaint.

Thirty-fifth. The said difference of $98,790.48 aforesaid should have been deducted and allowed to said plaintiff, and that it was inequitable, unjust and unlawful not to allow the same and that said properties, including said National plant and equipment depreciated in value a much larger sum during plaintiff's fiscal year of 1918 and 1919.

Thirty-six. The six months have elapsed since the filing of
21 said claim for refund; that five years have not elapsed since the date of the payment of said tax and sum aforesaid, and this action is brought within two years from the date of the payment of said sum and tax and within two years from the date of the disallowance of said claim for refund, and that five years have not elapsed since the due date of any of said returns.

Thirty-seventh. That said plaintiff's claim filed for refund for said sum of $19,062.95 and interest was in proper form and that the same was acted on by the Treasury Department and the United States Commissioner of Internal Revenue and disallowed for the reasons

stated in said rejections that "no deduction for obsolescence of good will is allowable to a taxpayer who continues in a similar trade or business after discontinuing its regular business because of prohibition." That the rejection of plaintiff's said claim on said grounds was unjust, unreasonable, inequitable, unfair, unlawful, unjustifiable from the facts, and arbitrarily made without any consideration of law or the facts.

Thirty-eighth. That said plaintiff did undertake to manufacture and sell cereal beverages containing not more than ½% of 1% alcohol by volume for a short time after Oct. 28, 1919, but did so at a loss and that its said trade names, liquor-tax certificate, National plant and equipment, and good will of its business enjoyed and carried on by it up to Oct. 28, 1919, which on that day became
22 obsolescences, were of no use, value, or benefit to plaintiff in the said cereal business and the same were not used by plaintiff therein, but that all use, value, and benefits to be derived therefrom were prohibited by said Volstead Act and the 18th amendment. That the manufacturing and selling of lager beer of 4% alcohol and ale of 4½% alcohol is not a similar business to manufacturing and selling cereal beverages of not over ½ of 1% alcohol. After Oct. 28, 1919, the one became unlawful and the latter is and always was lawful. Different methods of manufacture is used, different ingredients, and the products are not purchased or consumed by the same trade, class of people, and can not be consumed by the trades in equal amounts, the alcoholic contents of 4% to 4½% aids the digestive power, while the ½% per cent cereal beverage has none.

Thirty-ninth. That the law and the rulings of the Treasury Department and the United States Commissioner of Internal Revenue heretofore made and promulgated and now in force provide for and require the allowance of plaintiff's said claim, which said rulings, laws, and statute, including the laws and statutes of the State of New York in relation to liquor tax certificates, their renewals, and transfers, are severally herein pleaded and the same are hereby referred to and made a part of this complaint.

Fortieth. That no other action has been brought for the relief herein asked for.

23 Forty-first. Plaintiff further alleges on information and belief that during the years of 1918 and 1919 on account of said prohibition and said eighteenth amendment to the Constitution intended to discontinue from further use its National plant on Burnet Ave., Syracuse, N. Y., and that said National plant and its appurtenances, prior to its discontinuance was of great value and was worth and cost several hundred thousand dollars all of which became greatly depreciated and of little value after the beginning of the year 1918, and said plaintiff suffered a great loss thereby.

Forty-second. Plaintiff further alleges that during the years 1918 and 1919 it intended to discontinue the use of its outside properties mentioned and described in said schedule annexed to this complaint which had been used in connection with its business and furnished an output of its beer and to dispose of the same. That the same became useless in its business thereafter and that said outside property was of great value and said plaintiff suffered a great loss thereby.

Forty-third. Plaintiff further alleges on information and belief that said properties upon said prohibition law and eighteenth amendment going into effect, became of no value for the purpose for which plaintiff used the same and for which plaintiff acquired them.

Forty-fourth. Plaintiff alleges and shows to the Court upon
24 information and belief that said National plant was a separate unit of said plaintiff and was located on Burnet Ave., in said city and that the same was sold and disposed of by plaintiff and finally turned into a cold storage plant.

Wherefore plaintiff demands judgment against said defendant in the sum of nineteen thousand and sixty-two dollars and ninety-five cents ($19,062.95), with interest thereon from July 8, 1922 and that plaintiff be paid same together with the costs and expenses of this action.

WELCH & WELCH,
Attorney for Plaintiff.

Office & P. O. address, 706 City Bank Bldg., Syracuse, N. Y.

Schedule "A"

IT:CA:M-3
ADS-2121-11

HABERLE CRYSTAL SPRINGS BREWING CO.,
500 Butternut Street, Syracuse, N. Y.

SIRS: Reference is made to your claim for refund of income and profits taxes for the fiscal years ended May 31, 1918 and May
25 31, 1919, in the amount of $19,062.95, based upon your claim for a deduction for obsolescence of good will.

An examination of the information submitted discloses the fact that you engaged in the manufacture of nonintoxicating beverages after prohibition became effective.

In this connection, you are advised that in accordance with the provisions of O. D. 818, no deduction for obsolescence of good will is allowable to a taxpayer who continues in a similar trade or business after discontinuing its regular business because of prohibition.

Your claim will, therefore, be rejected in full and the formal rejec-

tion will officially appear on the next schedule to be approved by the Commissioner of Internal Revenue.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By F. R. CLUTE,
Head of Division.

26 *Schedule "B"*

	Character	Market value Mch. 1/13	Cost if acquired after Mch. 1/13	Improvements after Mch. 1/13	Estimated life after Mch. 1/13	Reason *	Depreciation from Mch. 1/13 to taxable year	Taken depreciation for taxable year	Allowed by bureau depreciation for taxable year
Kaiser	Brick	$6,974.80			24			$1,258.02	$286.45
Wiles	Wood	7,310.13			10			2,810.13	731.01
Dorschug	Brick	11,208.17			24			5,401.17	467.01
Graves	Wood	7,063.67			10			2,063.67	706.37
Masters	Wood	9,497.08			10			1,979.08	947.91
Knaul	Wood	8,777.49			10			4,277.49	877.75
Collins	Stone	8,337.99			24			3,337.99	347.42
McCarthy	Wood	5,814.10		$2,175.75	10			3,460.12	798.99
Dowling	Wood	12,164.78			10			5,164.78	1,216.48
Schwartz	Wood	5,500.00		380.75	10			1,244.43	588.08
Kelly	Brick		$3,500.00	7,648.60	24			6,148.60	464.53
Figula	Wood	8,143.25			10			4,143.25	814.33
Gildner	Wood		7,646.70	1,112.74	10			3,759.44	875.94
Scanlon	Brick		11,500.00		24		$2,000.00	2,500.00	479.17
C. & Z	Brick	7,143.48			24			1,143.48	297.65
Silverman	Brick		31,102.50		24			3,602.50	1,295.94
Mathias	Wood	3,400.00			10			900.00	340.00
Biehler	Brick	9,000.00		6,437.00	24		2,000.00	4,437.00	643.21
Cummins	Wood		5,276.32		10			2,776.32	527.63
Carey	Wood		13,995.00		10			4,995.00	1,399.50
Becker	Wood		9,818.75		10			2,818.79	981.88
Vedder	Wood		3,000.00		10			500.00	300.00
Andrilla	Brick		5,796.15		24			1,796.15	241.51
Hecht	Brick		11,500.00		24			3,500.00	479.17
Hennessey	Brick		25,029.34		24			6,029.34	1,042.89
Cochrane	Wood		11,457.25		10		2,000.00	1,957.25	1,145.73
Maher	Wood		9,293.17		10			4,293.17	929.32
Reyher	Wood		8,918.65		10			4,418.65	891.87
Botz	Wood		7,193.33		10			3,193.33	719.33
F. L. Marquardt	Wood		15,238.44		10		2,000.00	5,738.44	1,523.84
Gilfoyle	Wood		15,100.00		10		2,000.00	8,100.00	1,510.00
Burns	Brick		21,221.77		10		2,000.00	12,221.77	884.24
Bot (Burnet Ave)	Lot	4,569.27			24			3,569.27	
								123,538.63	23,755.15

* Prohibition—Properties purchased in competition to acquired business, at exorbitant prices, and natural wear and tear; reduced rentals due to restricted business.

27 [*Duly sworn to by Frank C. Biehler; jurat omitted in printing.*]

28 In United States District Court

[Title omitted.]

Amended answer

The above-named defendant for answer to the amended complaint of the pretended plaintiff alleges, denies and shows to the court:

1. Defendant admits each and every allegation set forth and contained in paragraph first of said amended complaint.

2. Defendant admits the allegations set forth and contained in paragraph second of the said amended complaint relating to the organization and incorporation of the said pretended plaintiff, the location of its principal office for the transaction of business, the nature of said business and that the same was prohibited by the enactment of the national prohibition act, commonly called the Volstead Act, as alleged in paragraph numbered "Second" of the said amended complaint, but the said defendant denies that said business
29 was prohibited on October 28,1919, but alleges that said act of Congress went into effect on or about the 16th or 17th days of January A. D. 1920; and as to whether or not said pretended plaintiff went into voluntary dissolution and liquidation and whether or not its assets have been practically, or in any manner liquidated and distributed as provided by the laws and statutes of the State of New York, said defendant has no knowledge or information upon which to base a belief as to the truth or falsity of such allegation and allegations and he denies the same; and said defendant denies that the said pretended plaintiff is duly and legally authorized to bring this action, or is legally capable of suing and of being sued upon claims or demand existing in favor of or against it, and said pretended plaintiff denies that its said pretended claim of a refund against said defendant stated in said amended complaint in said paragraph numbered "Second" thereof is still a claim enforcible against said defendant or a part of the assets of said pretended plaintiff, if it ever was dissolved; and said defendant avers and alleges that at the time of the commencement of this action, and thereafter, there was no such corporation as the said pretended plaintiff pretends to be in its said amended complaint, and that said pretended plaintiff has no legal capacity to sue in this action.

3. Said defendant admits each and every allegation of paragraph numbered "Third" of the said amended complaint, except the allegations thereof that the pretended plaintiff relied upon its privi-
30 lege and right to continue its business from May, 1892, up to August 10, 1917, and for the purpose of building up its trade and good will and purchased the real estate mentioned in said paragraph and became the owner thereof, or for any purpose whatsoever except to use its said realty for any and all kinds of business.

4. Said defendant admits each and every allegation of paragraph numbered "Fourth" of said amended complaint and alleges that said act applied to all persons engaged in like business as said pretended plaintiff.

5. Said defendant admits the adoption or ratification of the said eighteenth amendment, but alleges that said complete ratification thereof was on the 16th and not on the 17th day of January, 1920, and said defendant denies that said amendment prohibited said plaintiff from the manufacture, sale, or transportation of intoxicating liquors thereafter manufactured and sold by it and all others, and defendant avers that said amendment to the said Constitution became effective when said national prohibition act went into effect on the said 16th day of January, A. D. 1920.

6. Said defendant admits the enactment of the said national prohibition act, commonly known as the Volstead Act, which prohibited all persons engaged in manufacturing, selling, and transporting intoxicating liquors, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes,
but said defendant alleges that said act went into effect and
31 became effective upon the ratification of said eighteenth amendment to said Constitution on or about January 16, 1920, and not October 28, 1919; and said defendant admits that said pretended plaintiff and all others in like circumstances were prohibited and restrained from manufacturing, selling, and transporting intoxicating liquors for beverage purposes within said United States and its territories, containing more than one-half of one per cent of alcohol by volume.

7. Defendant admits each and every allegation of paragraph numbered "Seventh" of said amended complaint.

8. Said defendant admits that all of the acts, rules and regulations applicable to said amendment and said national prohibition act were and are binding on said pretended plaintiff prior to the commencement of this action and while it was a lawful corporation and then and there restrained pretended plaintiff from carrying on any business in violation thereof or of any part thereof.

9. Said defendant admits each and every allegation set forth and contained in pragraph numbered "Ninth" of said amended complaint.

10. Said defendant admits all the allegations of paragraph numbered "Tenth" in relation to its requirement to file the taxes therein mentioned and when the same was required to be made, filed and to become due and that said pretended plaintiff did file a return thereon, but this defendant denies that said return was correct and
just either according to the records of said pretended plain-
32 tiff or otherwise; defendant admits the verification of said return and the payment of the additional tax and assessment made in the year 1918, all of which is set forth in said paragraph; and that plaintiff made and filed a similar return at the time when

the same became due, but denies that the same was correct and just according to the record of said pretended plaintiff or otherwise; and defendant admits that said pretended plaintiff paid the additional tax assessed against pretended plaintiff as set forth in said paragraph, but denies each and every other allegation in said paragraph set forth and contained including the allegation that any tax mentioned therein was erroneously and unlawfully assessed against said plaintiff.

11. Said defendant admits that the said sum was paid by said pretended plaintiff to said defendant as set forth in said paragraph, but denies that the same was paid under protest and duress and defendant denies that the same was unlawfully or erroneously assessed or levied and that the same was erroneously or unlawfully received or collected by said defendant.

12. Said defendant admits all of the allegations of paragraph "Twelfth" of said complaint of pretented plaintiff except that the same was paid by pretended plaintiff under duress and protest, which allegation and allegations said defendant denies.

33 13. Said defendant admits each and every allegation of said paragraph numbered "Thirteenth" of said amended complaint relating to the filing of a claim in abatement and for refund for the sum and sums therein mentioned, but denies each and every other allegation set forth and contained in paragraph numbered "Fourteenth" of said amended complaint.

15. Said defendant admits each and all of the allegations set forth and contained in paragraph numbered "Fifteenth" of said amended complaint.

16. Said defendant denies each and every allegation set forth and contained in paragraph numbered "Sixteenth" of said amended complaint of pretended plaintiff.

17. Said defendant denies each and every allegation set forth and contained in paragraph numbered "Seventeenth" of the said amended complaint of pretended plaintiff.

18. Said defendant denies each and every allegation set forth and contained in paragraph numbered "Eighteenth" of said amended complaint except the amended claim by plaintiff after a deduction in the sum of $123,538.63 and the allowance in lieu thereof of $24,755.15 by said defendant, and said defendant denies each and every other allegation of said paragraph and particularly such allegations thereof as claimed that the allowances on the outside property of pretended plaintiff as claimed by and also on account of

34 "prohibition," and defendant avers that such allowances covered all other matters including obsolescence and obsolesences of good will of plaintiff and other things.

19. Said defendant denies each and every allegation set forth and contained in paragraph numbered "Nineteenth" of said amended complaint, except such allegation or allegations thereof which relate to the filing of the claim of pretended plaintiff and the amendments thereof, and said defendant denies that said allowance of $19,062.95, or any other sum, except that made by defendant is reasonable and defendant denies that pretended plaintiff is entitled to recover the same in this action with interest thereon.

20. Said defendant denies each and every allegation set forth and contained in paragraph numbered "Twentieth" of the said amended complaint.

21. Said defendant has no knowledge or information upon which to base an opinion or belief as to the truth or falsity of the several allegations contained in paragraph numbered "Twenty-first" of said amended complaint and defendant denies each and every other allegation of said paragraph.

22. Said defendant has no knowledge or information sufficient to enable him to form an opinion or belief as to the truth or falsity of any of the allegations of paragraph numbered "Twenty-second" of said amended complaint and he denies each and every allegation thereof.

23. Said defendant has not sufficient knowledge or information upon which to base an opinion or belief as to the truth or falsity of the several matters set forth and contained in paragraph numbered "Twenty-third" of said amended complaint and he denies each and every allegation thereof.

24. Said defendant has no knowledge or information sufficient to form an opinion or belief as to the truth or falsity of several allegations of paragraph numbered "Twenty-fourth" of the said amended complaint and he denies each and every allegation thereof.

25. Said defendant has no sufficient knowledge or information upon which to base a belief as to the truth or falsity of the several matters alleged in paragraph numbered "Twenty-fifth" of the said amended complaint and he, therefore, denies each and every allegation of said paragraph.

26. Said defendant has no sufficient knowledge or information upon which to base an opinion or belief as to the truth or falsity of the several matters alleged and set forth in paragraph numbered "Twenty-sixth" of said amended complaint and he denies each and every allegation of said paragraph "Twenty-sixth."

27. Said defendant has no sufficient knowledge or information upon which to base a belief as to the truth or falsity of the several matters alleged in paragraph numbered "Twenty-seventh" of the said amended complaint and he, therefore, denies each and every allegation of said paragraph.

36 28. Said defendant has not sufficient knowledge or information upon which to base an opinion or belief as to the truth or falsity of the several allegations of paragraph numbered "Twenty-eighth" of the said amended complaint and he denies each and every allegation of said paragraph.

29. Said defendant denies each and every allegation set forth and contained in paragraph numbered "Twenty-ninth" of the said amended complaint.

30. Said defendant has not sufficient knowledge or information upon which to base an opinion or belief as to the truth or falsity of the several allegations set forth and contained in paragraph "Thirty" of said amended complaint and he denies each and every allegation thereof; and said defendant avers and alleges that if said matters set forth and contained in said paragraph relating to the voluntary dissolution of said pretended plaintiff prior to the commencement of this action are true, that the claim sued upon herein is and was not continued as any of the assets of said pretended plaintiff, and that said pretended plaintiff is not now and was not at the time of the commencement of this action a corporation and is and was not then and there of legal capacity to institute and maintain this action.

31. Said defendant admits each and every allegation of paragraph numbered "Thirty-first" of said amended complaint except
37 that said claim of said pretended plaintiff therein mentioned was rejected and disallowed on or about June 25, 1922, instead of on or about June 16, 1923.

32. Said defendant admits each and every allegation contained and set forth in paragraph numbered "Thirty-second" of said amended complaint.

33. Said defendant denies each and every allegation set forth and contained in paragraph "Thirty-third" of the said amended complaint.

34. Said defendant admits each and every allegation set forth and contained in paragraph numbered "Thirty-fourth" of said amended complaint except that the differences between the amount so claimed by pretended plaintiff and the amount allowed by defendant is the sum of $98,783.48 instead of $98,790.48.

35. Said defendant denies each and every allegation set forth and contained in paragraph numbered "Thirty-fifth" of said amended complaint.

36. Said defendant admits each and every allegation of said paragraph numbered "Thirty-sixth" of said amended complaint except that this action brought within two years from the date of the payment of the said sum and tax and defendant avers that this action was not brought within two years from the date of the payment of said sum or sums or tax or taxes.

37. Said defendant denies each and every allegation set forth and contained in paragraph numbered "Thirty-seventh" of the
38 said amended complaint relating to the rejection of the pretended plaintiff's claim as unjust, or unreasonable, or inequitable, or unfair, or unlawful, or unjustifiable from the facts or any other matter or thing or that the same was made without any consideration of the law or the facts governing the disposition of the said claim; that said defendant admits that the said pretended plaintiff's claim was filed for the said sum mentioned in said paragraph, but avers that the rejection thereof was for a good and sufficient reason and because the said pretended plaintiff continued in a similar trade and business until its dissolution and that the said property upon which said taxes and assessments were levied and imposed were all the same realty and that there was no obsolescence or depreciation in value thereof during any of the times mentioned in said complaint.

38. Said defendant has not sufficient knowledge or information to enable him to form an opinion or belief concerning the several allegations of paragraph numbered "Thirty-eight" of the said amended complaint and he denies each and every allegation thereof.

39. Said defendant denies each and every allegation set forth and contained in paragraph numbered "Thirty-ninth" of said amended complaint.

40. Said defendant admits each and every allegation contained and set forth in paragraph numbered "Forty" of the said amended complaint.

39 FIRST SEPARATE DEFENSE

For a first, separate defense hereto, defendant alleges on information and belief:

I. That for a period of many years immediately prior to August 10, 1917, defendant was engaged in the business of manufacturing and selling alcoholic and cereal beverages, to wit: Lager beer and ale, at the city of Syracuse, New York, and so continued until said business was prohibited by the passage of the various acts of Congress set forth in the complaint, and used its capital, plant, machinery, real estate, properties, and other assets in the conduct of such business as aforesaid. That on and after August 10, 1917, and after October 29, 1927, plaintiff continued to use its said capital assets, property, plant, machinery, and real estate in the manufacture and sale of cereal beverages and so continued during the years 1918 and 1919 and until and after May 31, 1919; and that for such reasons under the several acts of Congress of the United States of America and the rules and regulations promulgated to carry the same into effect under and by virtue of the provisions of said act, the said deductions and

obsolescences claimed by said pretended plaintiff in its amended complaint herein are unfounded, illegal, vexatious, and void and that said pretended claim of said pretended plaintiff could not be allowed by said defendant or his superior officers.

40 SECOND SEPARATE DEFENSE

For a second and separate defense herein, said defendant denies each and every allegation of said amended complaint not in this answer expressly admitted or heretofore denied.

Wherefore, defendant demands judgment that the amended complaint of the said pretended plaintiff be dismissed with costs for all proper relief.

OLIVER D. BURDEN,
United States Attorney for the Northern District of New York.

Office and P. O. address, Federal Building, Syracuse, N. Y.

[*Duly sworn to by Jesse W. Clarke; jurat omitted in printing.*]

41 In United States District Court

[Title omitted.]

Answer to second amended complaint

The above-named defendant for his answer to the second amended complaint of the pretended and above-named defendant, having stipulated and agreed to and with the said plaintiff, that a second amended complaint should be filed—and it appearing that each
42 and every allegation of said second amended complaint verified on the 7th day of January, A. D. 1925, and thereafter filed in this cause, is the same as in the first amended complaint of said plaintiff, except the allegations therein contained in the paragraphs numbered Forty-first, Forty-second, Forty-third, and Forty-fourth of said second amended complaint, in order to avoid useless repetition, and prolixity in pleading, said defendant adopts his answer to the first amended or corrected complaint of plaintiff, and for his additional answer to said second amended complaint of plaintiff, avers and alleges:

I. That he denies upon information and belief each and every new allegation contained in said second amended complaint, the same being each and every allegation set forth and contained in said paragraphs numbered Forty-first, Forty-second, Forty-third, and Forty-fourth thereof;

II. Said defendant further answering said second amended complaint of plaintiff denies each and every allegation thereof, not expressly admitted in this answer and in his answer to said first amended complaint of plaintiff;

III. Said defendant alleges and submits that the said first and second amended complaints of said plaintiff does not state facts sufficient to constitute a cause of action;

IV. Said defendant alleges and submits that the said first and second amended complaints of said plaintiff do not state facts sufficient to constitute a cause of action in favor of said plaintiff;

43 V. Said defendant alleges and submits that the said first and second amended complaints of said plaintiff do not state facts sufficient to constitute a cause of action against this defendant.

Wherefore, said defendant demands judgment that the said plaintiff take nothing by its said action against him, and that the said amended complaints of said plaintiff be dismissed with judgment for defendant for all of his costs and disbursements, and for all proper relief.

(Signed) OLIVER D. BURDEN,
United States District Attorney for the
Northern District of New York, and
Attorney for said defendant,
Federal Bldg., Syracuse, N. Y.

[*Duly sworn to by Claude Bonsted; jurat omitted in printing.*]

45 In United States District Court

[Title omitted.]

Minutes of proceedings.

Minutes of proceedings had in the above entitled matter before Honorable James J. Barrett, referee, in the United States district attorney's office, Post Office Building, Syracuse, New York, commencing on Monday, June 29th, 1925, at 10.00 a. m., daylight saving time.

Presiding: Honorable James J. Barrett, referee.

Appearances: Messrs. Welch & Welch, Syracuse, New York, attorneys for the plaintiff.

Honorable Oliver D. Burden, United States district attorney; H. V. S. Grosbeck, assistant United States district attorney, northern district of New York; F. F. Toomey, solicitor, Treasury
46 Department, Washington, D. C.; and Frank B. Hudson, inspector, 21st district, New York; for the Government, defendant.

In United States District Court

[Title omitted.]

Order of reference

May 5, 1925

This case being upon the calendar of a term of the above court commenced at the court house in the city of Syracuse, N. Y., on May 4, 1925, and it appearing that this case is a difficult case to be
47 tried before a jury and that it involves a long account and many figures and facts concerning many figures will be involved, and both parties being in court and their written stipulation, dated May 5, 1925, waiving a trial by jury and consenting to a reference being herewith filed, and both parties consenting thereto in open court, it is

Ordered, adjudged, and decreed that James J. Barrett, an attorney of Syracuse, N. Y., be, and he hereby is, appointed referee to hear and try all the issues of law and fact raised by the pleadings and arising upon the trial of this action, and it is further

Ordered, adjudged, and decreed that said referee shall report to this court the evidence taken before him with his findings of fact and conclusions of law and his decision thereon by the 1st day of October, 1925, and the same shall be filed to wait the further action of this court to approve or disapprove the said findings of fact and conclusions of law and decision in whole or in part.

[Signed] FRANK COOPER,
U. S. District Judge, Northern District of New York.

48 In United States District Court, Northern District of New York

THE HABERLE-CRYSTAL SPRINGS BREWING COMPANY, PLAINTIFF

AGAINST

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE 21ST District, New York, defendant

Statement of evidence before referee

Oath of referee

STATE OF NEW YORK,
County of Onondaga, city of Syracuse, ss:

I, James J. Barrett, the referee appointed in this action, do solemnly swear that I will faithfully and fairly try the issues and

determine the questions referred to me, in this action, and a just and true report make therein, according to the best of my understanding, so help me God.

(Signed) JAMES J. BARRETT.

Sworn to before me this 29th day of June, 1925.

(Signed) FRANK B. HUDSON,
Notary Public.

Colloquy between court and counsel.

Mr. BURDEN. I understand you do not care to open, Mr. Welch?

Mr. WELCH. What is it?

Mr. BURDEN. Do you care to tell Judge Barrett what your claim is?

Mr. WELCH. The judge, I guess, had read the pleadings.

The REFEREE. Yes; I have looked them over.

Mr. BURDEN. Now, we are prepared to open, and Judge Groesback is going to open, first, on his theory of the Government's defense, and I would like to have Mr. Toomey hear it, and then, perhaps he will follow, and then I will put in the evidence when it comes to my turn.

Mr. WELCH. New, as to the referee's oath, heretofore taken, sworn to and filed, it is stipulated that this oath is in proper form and that no other or further oath is necessary.

Mr. BURDEN. Yes.

Mr. WELCH. It is further stipulated that the minutes of the proceedings, testimony, and so forth, had and taken in this matter be taken by the stenographic firm of Welsh & Munger, of Albany, N. Y., that they furnish three copies of the transcript thereof, one to the referee and one to the plaintiff and one to the defendant, the charge therefor to be thirty-seven and a half cents per page to each side.

Mr. BURDEN. That is satisfactory to the Government.

The REFEREE. Did you say, Mr. Burden, that your assistant was going to open for the Government?

Mr. BURDEN. Yes. But, I think, Mr. Referee, that Mr. Welch should state breifly for the record the claim of the plaintiff.

The REFEREE. Do you want to do that Mr. Welch?

Mr. WALTER WELCH. I do not want to go into it at any great length at this time, Mr. Referee.

The REFEREE. Well, just a brief statement, so long as the United States attorney is going to state his position.

Statement of case

Mr. WELCH. This action is brought to recover money paid to the Government for taxes, paid under protest; I thing the amount runs

around somewhere between nineteen and twenty-one thousand dollars, with interest from the time of payment, which will appear here in the evidence.

Now, in short, this is the condition of affairs in this action: For the years 1918 and 1919 the plaintiff made their report and paid their taxes upon that report. They made certain deductions, in getting out that report, for good will and such as that, obsolescences, and so on, and the Government rejected that claim and sent them a bill for their taxes—in other words, for these nineteen, twenty-one, or twenty-two thousand dollars, somewhere around there—and they had to pay it, and they paid it under protest to Mr. Clarke, the defendant in this case; and there is an item, I think, for the year 1918, of some-
51 thing like five or six hundred dollars, and we will produce our expert who will go over and through those figures, and I believe there are two items here. There is a large item, which is for the year 1919, I believe it is; and we made a claim in abatement which was disallowed, and we made a request for return of the tax paid and that was disallowed, and we brought this action against the collector to recover this money back, the same having been brought within the prescribed time under the law, and I assume that we are all regular here as to that.

And the defendant comes in and answers and refuses to pay, and so, we are here in this action to get that money back that we paid them, amounting to about twenty-one thousand dollars, or so.

Now, in short, that is about the situation in this case.

I might say this, that this corporation went into voluntary dissolution under the State law, and this statute in effect at the time they went into voluntary dissolution, of course, gave them the right to sue and to be sued, and so on, and they have gone into liquidation and they have practically liquidated, although there are some things that are not yet liquidated. There is this action, and some other judgments that the company has, that has not been paid and which they still owe and hold, but there is not a whole lot of it, and I guess a few notes or something like that, and, as I say, there is not a whole lot of it but what has been liquidated, except this action, and, as I say, some judgments and a few notes and something of that kind.

52 Now, that is the gist of this action.

Mr. GROESBECK. If your honor, please, on behalf of the defendant, the collector of internal revenue, I have a brief statement to make.

It is thought best at the threshold of this case to state, as briefly as possible, the contentions of the Government acting through its local collector of internal revenue for this twenty-first district of

New York, who is the one sued in this action, Jesse W. Clarke, collector.

The claims of the plaintiff as stated in its last amended complaint are for—

First, $569.82, as a counterclaim for excess of taxes paid for the fiscal year 1918, and interest; and

Second, $17,283.20, additional tax, and $1,209.83, penalty for the fiscal year ending May 31st, 1919, and interest thereon.

I think the principal is something over nineteen thousand dollars. In the demand here and prayer for relief it is stated as nineteen thousand and sixty-two dollars and ninety-five cents.

The suit was brought in 1923, the tenth of August, I think, as near as I can get at it from Mr. Welch's statement to me and looking over the verification of the first complaint. No claim has been made for the fiscal year ending May 31st, 1920, and May 31st, 1921, although it is alleged in the complaint that plaintiff voluntarily dissolved on December 31st, 1920, that is, without judicial proceedings.

53 The defendant here will insist that there is not and was not at the time of the commencement of this action any such corporation as the plaintiff, which is the plea of nul tiel corporation. The statute passed after the corporation was dissolved, as is alleged, does provide that the defunct corporation is continued for the purpose of paying debts and of collecting assets, but it does not repeal a former statute requiring it to sue in the names of its trustees. The statutes of this State are to be construed in pari materia, and that suit should have been brought for the benefit of the trustees of the stockholders. In fact, we shall contend that, if there is a judgment here, there is nobody to whom to pay it. The corporation is dead. It is closed. And, although a court would never allow a trust to fail for lack of a trustee, that does not apply in this case, because the suit must be brought in the name of the real party in interest. That is one of the fundamentals.

The allegations as to dissolution are specifically traversed in the answer and the burden is upon the plaintiff to show the legality and regularity of the dissolution of the corporation, either by non-judicial proceedings, as alleged, or otherwise.

Second. The claim is for "obsolescences" of good will and, perhaps, of property owing to the ratification of the eighteenth amendment to the Constitution of the United States, and the

54 enactment of the national prohibition act, commonly called the Volstead law, which took effect on January 17th, 1920—I find you are right about that, Mr. Welch, that, instead of the sixteenth, it took effect the day after—which it claims depreciated the business and good will of the plaintiff.

No such claim was ever presented to the local collector of internal revenue for this twenty-first district of New York, or to the Commissioner of Internal Revenue, in reality, and it is disclosed by the complaint that the reliance of the plaintiff is upon depreciation of real estate alone, the outside properties of this corporation, and not for obsolescences. Now, "obsolescences" is a term that has been used and been engrafted into the law, and it means "obsolete," things useless, things that are useful no more, like machinery and things of that sort, and by no possible stretch of the imagination can the term be used in the sense that it is sought to be used in this action.

Now, Schedule "B" attached to the complaint shows this: The action claim of plaintiff is for depreciation of real property belonging to it. It seems that there was no real dispute between the Government and the plaintiff as to the actual value of the real estate of the plaintiff, which was $344,559.18. The amount of deductions for depreciation of real estate claimed by plaintiff company was and is $123,538.83, and this is for the fiscal year ending May 31st, 1919. The Government allowance was $24,755.16, and though Schedule
55 "B" as attached to the complaint, shows one thousand dollars less, or $23,755.15, that is conceded to be an error and has been corrected this morning, so, there is no dispute now about that. The actual Government allowance was and is $24,755.15.

The average deduction on the total amount of property claimed is about thirty-six per cent—that is the average, I don't mean each specific property, but adding them all together the company claims a depreciation of thirty-six per cent on their property for the year 1919—while the average of the Government allowance for depreciation was and is 7.2 per centum, or one-fifth of the amount claimed, a difference of allowance for depreciation, not for "obsolescence," of some $98,790.48. There seems to be a difference there of some seven or eight dollars, but that is immaterial as it will be met in the proof.

The claim presented and now insisted upon is for "obsolescences" and not for depreciation of real estate, an irreconcilable difference. The claim presented to the internal revenue officers, and even here, can not be tortured into the actual claim of the plaintiff. The law and the regulations thereunder that have the force of law require the exact claim to be presented. That has not been done. "Obsolescence" means a deduction for obsolete machinery or property, something that can not be used at all. It is not like "depreciation,"
56 which is a matter of decrease in earning power or in absolute efficiency, but only in a relative efficiency. It may occur from changes due to the normal progress of the art in which the machinery or property may be used, or by becoming inadequate to the growing needs of the business.

It is for obsolescence of structure, machinery, and personalty, never for realty, except possibly for improvements, which are no longer useful or of value. It means grown out of use; disused; antiquated. Depreciation is the loss in value of some destructible property.

Third. At the time these taxes accrued there were not allowances or deductions for obsolescences. The revenue act of 1917 (act of September 8, 1916, chapter 462, section 5), (U. S. Compiled Statutes, 1916, section 6336, c, page 7339; Barnes Federal Code, 1919—up to December, 1918), has this provision for deduction applicable in the instant case:

"Seventh. A reasonable allowance for the exhaustion, wear, and tear of property arising out of its use and employment in the business and trade."

Now, there is nothing said there about "obsolescence." This provision was kept alive "for the assessment and collection of all taxes which have accrued thereunder, and for the imposition and collection of all penalties or forfeitures which have accrued and may accrue in relation to any such taxes."

That is the act of February 24th, 1919, called the revenue act of 1918, taking effect the day following its passage, chapter 8, section 1400, paragraph or subdivision (b), 40 Statutes at Large, volume 1, page 1150.

Now, this later act does provide for "obsolescences." That is, the act of 1919, called the revenue act of 1918, and others following have amended the original provisions to read as follows:

"8. A reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

That was not in the former law, the law on and under which we contend that this property was assessed. That is the act of February 24, 1919, chapter 18, section 214—section 63361/8 g., U. S. Compiled Statutes, Annotated Supplement, 1919, paragraph 8, page 1324.

The most that can be claimed by plaintiff-claimant is that for the interval between the 25th day of February, 1919, when the act last aforesaid took effect, that is, the day after its passage, and the 31st day of May, 1919, at the end of its fiscal year, a period of ninety-five days, for which obsolescence could be allowed, but the taxes had accrued prior to the last-mentioned date, as three-fourths of the fiscal year had elapsed at the time of the taking effect of said act of February 24th, 1919, that is, on February 25th, 1919. But, this is begging the question. De minimis non curat lex; the law does not concern itself with trifles.

There can be no claim for obsolescences for either of these fiscal years of the plaintiff company, as none were allowed.

Fourth. That the commissioner of internal revenue, treating the claim as one for obsolescence, and he did treat it as that, was right in rejecting it. He held that an examination of the information submitted discloses the fact that the claimant taxpayer engaged in the manufacture of nonintoxicating beverages after prohibition became effective; and in this connection the rule laid down in office decision 818 is, "no deduction for obsolescence of good will is allowance to a taxpayer who continued in a similar trade or business after discontinuing the regular business because of prohibition."

Schedule "A" attached to the complaint contains this decision, which was evidently followed by a later one, which states that—

"Your return for 1921 shows that the corporation is engaged in the manufacture of intoxicating beverages. In this connection your attention is invited to office decision 472, in Bulletin 17-27; 884, paragraph 3, which reads, in part, as follows:

"'No allowance for obsolescence will be granted in any case where, in connection with the operation of the business the good will
59 is valuable in another business in which the taxpayer is engaged.'

"And further:

"'In the case of dealers who continue in a similar trade or business of such intangibles is not definitely limited, although the profits may have been reduced.

"'Therefore, liquor dealers who continue in a similar trade or business cannot obtain a reduction under section 214 (8), on account of obsolescences of their good will, trade-marks, or trade brands.'

"It is held, therefore, that the good will of your business is still valuable in connection with your present business. Your claims are therefore rejected. The rejection of your claims will appear officially in the next schedule to be approved by the commissioner."

Now, this decision, your honor, is not cited in the complaint. This ruling appears to have been made on June 29th, 1922. Therefore, treating the claims as for obsolescences as the commissioner evidently did from the claims as filed with him, and with regard to the return of the plaintiff for 1921, it must have been for that portion of the year, 1920, from the end of May 1st, 1920, to December 31st, 1920, when they claim they went out of business, or that portion of the fiscal year ending May 31st, 1921, less the interval between that and December 31st, 1920, when the company dissolved and went out of business.

60 But the commissioner might well have refused to consider the claim as one for obsolescences, as it was really for depreciation of real estate, of the "outside properties," and not those connected with the brewery plant. This depreciation the Government evidently considered as taking about fourteen years, with 100

as the basis, and dividing 100 by 14, the result would be between 7.2 per cent and 7.3 per cent, just the amount of depreciation that makes up the average depreciation and total depreciation allowed by the Government. The plaintiff claims an average of thirty-six per cent for depreciation or obsolescence and, if this were allowed, in less than three years there would be left no value at all of its property, because three times thirty-six is one hundred and eight per cent.

Fifth. The only depreciation charged off by this taxpayer plaintiff on the books thereof, covering the properties in question, was as follows:

Fiscal year ending May 31, 1918	$12,000.00
Fiscal year ending May 31, 1919	133,545.63

The difference is for the $10,000.00 charged off on the Pleasant Beach property at Oneida Lake, probably leaving the last item above at $123,545.63, about what they claim.

This one year's depreciation, covering the said fiscal year ending May 31st, 1919, is grossly excessive, as it covers depreciation which should have been charged off in prior years.

The alowance of $24,755.15, as made by the Bureau of
61 Internal Revenue was practically correct, as it was determined after close inspection and examination.

Sixth. Claim is made for obsolescense on account of licenses that were automatically annulled by the enactment of the national prohibition act—State licenses and, perhaps, municipal licenses. No deduction can be claimed on this account, however large the real or imaginary value thereof. This claim cannot possibly be allowed, on account of prohibition and the loss of State licenses (5881), Prentice-Hall Federal Tax Service—Holmes on Federal Taxation.

Seventh. The additional return made by the commissioner is presumably correct. It can only be overturned by evidence clearly showing it to be erroneous. In that connection I wish to cite Part Falls Lumber Company versus Burlingame, I Federal (2nd) 855; Western Funeral Benefit Association versus Hellmich, 2 Federal (2nd) 367, 369, citing Bank of Commerce versus Tennessee 161 United States, 134.

Eighth. The burden of proof is on the plaintiff to prove every material allegation of the complaint. The rule in civil actions is that the plaintiff must prove such allegations by a preponderance of the evidence. Not only that, but the presumption is that a tax like this is legal, and the burden of the proof is on the claimant plaintiff to show that it is erroneous, that is, all the decisions hold that.

62 Ninth. The regulations of the Treasury Department, and those of its Bureau of Internal Revenue, concerning income

tax returns, not in conflict with express statutory provisions, have the force of law.

Capwell Horse Nail Company versus Walsh, 1 Federal (2nd) 815, 818, citing:

Johnston versus United States, 290 Federal, 120,123;
United States versus Grimaud, 220 U. S., 506;
United States versus Birdsall, 233 U. S., 223;
United States versus Moorehead, 243 U. S., 607.

To support these conclusions, there will be cited by the Government many authorities to substantiate these views. They are intended for a statement at the beginning of the hearing.

Now, I presume Mr. Toomey may have something to say.

Mr. BURDEN. If there is no objection, I will ask Mr. Toomey to make a statement on certain features involved in this action.

The REFEREE. All right. Proceed.

Mr. TOOMEY. We fear that it might confuse things if we make our opening statement too involved. However, there is just one further thing that we think should go into the opening statement. Counsel for the plaintiff here was very brief in his statement and he did not really give the theory upon which they are seeking to recover. As the Government sees it there are several insuperable
63 objections to the action. In the first place, the manner in which the suit is brought, which will be taken up by Mr. Burden, as I understand.

Mr. Welch stated or inferred that this suit, or recovery in this action is sought to be made upon the theory that certain deductions were claimed in the original return of this taxpayer which were disallowed. The facts will be shown, I don't think they will be disputed, documentary evidence introduced will prove it, that the original return made by this taxpayer for the fiscal year ending May 31st, 1919, which year involved all except about six hundred dollars of this tax, in that return the taxpayer claimed a deduction of $123,545.63, on account of the depreciation of certain outside real estate owned by this brewing company. Of that amount the Commissioner of Internal Revenue, upon auditing the taxpayer's return, allowed as a deduction on that account $24,755.15, disallowing of that amount $98,790.48. The disallowance of that ninety-eight thousand dollars results in the tax sued for in this action, and it results from the disallowance of the depreciation on outside real estate. There was no claim made in the return for obsolescences of good will.

Now, then, the additional assessment is made and the taxpayer pays it under protest, and then there is a statutory requirement and it is a jurisdictional prequisite that the taxpayer must make a
64 claim for refund. That is section 3226 and which will be brought into the case, and which will be referred to further.

In making the claim for refund, this taxpayer did not say a word about depreciation of outside real estate. He bases it entirely upon obsolescences of good will.

The REFEREE. Was there a claim for refund?

Mr. TOOMEY. Yes, sir; there was a claim for refund in which the taxpayer concedes the commissioner' computation with reference to depreciation of real estate; and then he seeks to recover back the amount of taxes which resulted from that, in other words, he claims refund for the amount of taxes which resulted from a disallowance of depreciation of outside real estate, claims it on the ground of deduction for obsolescence of good will. Now, he comes into court and seeks to recover back, primarily, as I understand it, upon the disallowance of depreciation on outside real estate.

Now, it is going to be the position of the Government in this case, for one thing, at least, that under section 3226 of the Revised Statutes, which provides for the filing of the claim for refund and in connection therewith this jurisdictional prerequisite before the court can take jurisdiction of these things, that the plaintiff can not recover in this case upon the theory of the deduction of depreciation on
on outside real estate, because that was conceded by the tax-
65 payer in his claim for refund and he did not claim refund
upon that ground at all.

I do not think it is necessary to make any further statement, but I thought it was necessary to make at least that much of a statement to clear the situation.

Mr. BURDEN: Do you want to make any further statement, Mr. Welch? I want to make a motion for dismissal, and I thought I would give you notice.

The REFEREE. Off the record.

(Discussion outside the record which the stenographer was directed not to take.)

Motion to dismiss

Mr. BURDEN. Now, if the Court please, the defendant moves to dismiss the case upon the pleadings and the opening, upon the ground that the complaint, the amended complaint does not state facts sufficient to constitute a cause of action, and that the opening by the counsel for the plaintiff does not entitle the plaintiff to any demand for any further amendment at this time, and, further, that no suit or procedure can be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed for being collected without authority, or any sum alleged to have been excessive or in
66 any manner wrongfully collected, until a claim for a refund
or credit has been duly filed with the Commissioner of Inter-

nal Revenue according to the provisions of law in that regard and the rules and regulations of the Secretary of the Treasury established and adopted in pursuance thereof; and upon the further ground that under the form of action brought the plaintiff has no standing in court.

We move for a dismissal on the further ground that the company plaintiff has dissolved voluntarily and without judicial proceedings, and yet they have sued as a corporation, and it appears in the bill of complaint that this corporation was dissolved prior to the act or acts involved in this action, and, of course, as stated in the opening by Judge Groesbeck, we claim right under the statutes of the State of New York and the decisions, they must have sued and should have sued as trustees. That point was raised in the opening.

Mr. WELCH.—We might as well put the cards on the table. This statute under which we dissolved says that they should continue and that they can sue and be sued under this voluntary dissolution. It was not a forced dissolution. Section 221 of the General Corporation Law, which was repealed by the Laws of 1923, chapter 787, section 2, in effect October 1st, 1923, provided by subdivision 3 that—"Said corporation shall nevertheless continue in existence for the purpose of paying, satisfying and discharging any existing debts or obligations, collecting and distributing its assets and doing all other
67 acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts or obligations, until its business and affairs are fully adjusted and wound up."

Now, then, there is the case of the Security Trust Company against Pritchard, 201 Appelate Division, 142, which was a decision by our own fourth department up here and is a case in point under this section, and it was decided in May, 1922, and there is a lot of cases holding, under the old common law, in effect, that the trustees are simply liquidators. I appreciate before this statute, under the common law, that it might be different.

The REFEREE. There is no trustee here?

Mr. WELCH. No, sir; just simply——

Mr. BURDEN (interrupting). Our position is that the statute passed after the corporation was dissolved, as is alleged, does provide that the defunct corporation is continued for the purpose of paying debts and collecting assets, but it does not repeal the former statute requiring it to sue in the name of its trustee.

The REFEREE. You may make and file a brief on the law touching that point, if you care to.

(Further discussion outside the record which the stenographer was directed not to take).

Mr. BURDEN. We take the position, as stated, with reference to this dissolution of the corporation, and our brief on the subject, which is not in shape to hand your honor but will be directly, is this:

The company plaintiff has dissolved voluntarily and without judicial proceedings. Now, we take these allegations from the second amended complaint as the plaintiff states them, and all I say here is based on their own statements in the second amended complaint. But, we say that, no matter in what manner it has been dissolved, the action should be brought in the name of its directors in esse at the time the corporation was dissolved and not in the name of the corporation, and we say in our brief that this omission is fatal to the action.

The allegation of paragraph second of the second amended complaint is that—

"on or about December 31, 1920, said plaintiff went into actual voluntary dissolution and its assets have been practically all liquidated and disturbed as provided by the laws and statutes of the State of New York, except its claim of refund against said defendant hereinafter state, and said plaintiff is duly and lagally authorized to bring this action and is legally capable of suing and of being sued upon claims or demands existing in favor of or against it." (Paragraph 2, page 1 of second and last amended complaint.)

This is generally and specifically denied in the paragraph numbered 2 of our first answer, adopted in the second answer, and in which we raise the plea or issue of nul tiel corporation; to wit, there is no such corporation.

The claim of the plaintiff company that it is in existence since its dissolution is evidently based upon the following statute of the State of New York, namely:

"Section 8. Such corporation shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations, collecting and distributing assets, and doing all other acts required to adjust and wind up its business and affairs, and may sue and be sued in its corporate name."

Now, that is subdivision 8, section 105, chapter 787, Laws of 1923, N. Y.—58 McKinney's Consolidated Laws of New York, page 413.

But this was the law as passed in 1923, and did not apply when the company corporation was dissolved voluntarily, and evidently without judicial proceedings therefor, as the statute of this State of New York then read as follows:

"Said corporation shall nevertheless continue in existence for the purpose of paying, satisfying, and discharging any existing debts or obligations, collecting and distributing its assets and doing all other

acts required in order to adjust and wind up its business and affairs, and may sue and be sued for the purpose of enforcing such debts or obligations, until its business and affairs are fully adjusted and wound up."

70 That is general corporation law, subdivision 3, of section 221—22 McKinney's Consolidated Laws of New York, page 377.

And this was, of course, to be construed with another statutory provision, which reads as follows:

"Section 35. Directors as Trustees in Case of Dissolution.

Upon the dissolution of any corporation, its directors, unless other persons shall be appointed by the legislature, or by some court of competent jurisdiction, shall be the trustees of its creditors, stockholders or members and shall have full power to settle its affairs, collect and pay outstanding debts, and divide among the persons entitled thereto the money and other property remaining after payment of debts and necessary expenses.

Such trustees shall have authority to sue for and recover the debt and property of the corporation, by their name, as such trustees, and shall jointly and severally be personally liable to its creditors, stockholders or members to the extent of its property and effects that shall come into their hands."

Section 35, General Corporation Laws of New York, 22. McKinney's Consolidated Laws of New York, pages 239, 240.

The later act, of course, must govern, as to the corporations dissolving subsequently to the passage of the later law, being the

71 laws of 1923, chapter 787, section 105 supra, but this corporation was dissolved, as the complaint sets out, on December 31, 1920, more than two years before the passage of said later act, which in said subdivision 8 of said section 105 of the stock corporation law, provides that such dissolved corporation, inter alia, may collect and distribute the assets, and for that purpose, as well as for the payment of its obligations "may sue and be sued in its corporate name." This defunct corporation plaintiff must therefore act, and can only act, under the provisions of the prior law, which provided that it could act after dissolution, and how it could act, and that was only through its directors as trustees for that purpose.

So it was held in 1909 that—

"Upon the voluntary dissolution of a corporation, the directors become trustees for the creditors and it is their duty to settle the affairs of the corporation, collect assets, pay debts, and divide the money and other property remaining among the persons entitled thereto. And even though the directors of a corporation, after dissolution, have illegally distributed its assets without providing for a

judgment on which the corporation was liable, a receiver pendente lite will not be appointed in a subsequent action by the judgment creditor against the corporation and its directors. This because owing to the distribution the corporation owns no property
72 and the directors who participated in the distribution are jointly and severally personally liable for the damages sustained by the judgment creditor."

That case is Tapley Company versus J. F. Keller (1909), 133 Appellate Division 54, book 58, McKinney's Stock Corporation Law—Consolidated Laws of New York, 414.

If the corporation then was not in esse, under this former law, the directors, as trustees alone, can be sued, and conversely must sue in their own names in behalf of the stockholders. The suit can not be brought by the corporation, as it was dissolved by a former law by which it is bound.

I do not know as it is proper to put all this on the record about these Federal cases, and so forth.

The Referee. I don't think it is necessary to go any farther. Your opening covered all that.

Your contention simply is that this action was commenced after this act of 1923 took effect?

Mr. Walter Welch. Because, your honor, section 221 of the general corporation law that had been in effect for some years was repealed by this other law that took effect October 1st, 1923. This section 221, which was in effect when this action was brought, specifically provided that it may sue and be sued for the purpose of enforcing such debts or obligations until its business and affairs are fully adjusted and wound up.

Now, the case of the Security Trust Company against
73 Pritchard, which we cite from, 201 Appellate Division 142, a decision in this department, which was decided in May, 1922, in which it construed this section 221, which was in effect when this action was started, that action was brought against the directors of a corporation as liquidating trustees, as Mr. Burden claims this action should have been brought and the defendants, who were the directors, demurred on the ground that there was a defective parties defendant, and that the corporation was not made a defendant. This corporation had been dissolved under this same section 221 of the general corporation law, and the court held that there was a defect in parties defendant in failing to join the corporation as a party. The court further held that section 35 of the general corporation law, which counsel has quoted here, was superseded by section 221 of the general corporation law, and they held the corporation is still in existence, and would, on plaintiff's theory, be entitled to the property, and if the

conveyance is declared void the corporation is a necessary party. It is the liquidator, because the action belongs to it; the cause of action belongs to it, and it was the one to assert the right to recover misappropriated corporate assets. It was the corporation's duty to bring the action, and the plaintiff's cause of action arose only when it refused or failed to bring it. Necessarily it should be joined as a party defendant, and they cite 216 New York 387 and 181 New York 121 and 176 New York 119. So that case is right in point.

74 The REFEREE. Let me ask you one question: Was your action begun after that change was made in the law; that is, the later——

Mr. WELCH (interrupting). Section 221.

The REFEREE. The amendment was to the effect that it could be sued or could sue in the corporate name?

Mr. WELCH. Yes.

The REFEREE. Was your action begun before that amendment was made?

Mr. WELCH. Yes. Our action was begun while section 221 was in effect, which provided that it may sue and be sued, and this case I cited construes section 221, construes the section we brought this action under.

Mr. BURDEN. We will be glad to furnish your honor with a full brief on the subject. Now, you get the exact point. We contend, as I stated, that conceding their claim is that this defendant is in existence since its dissolution; that is, as they claim, under section 8, we say this was the law as passed in 1923 and did not apply when the corporation was dissolved as you allege in the complaint, voluntarily and without judicial proceedings and that they come under the other section which I quoted.

Mr. WELCH. Well, now your claim here is this, isn't it: Your claim is that this action should have been brought in the name of the trustees?

Mr. BURDEN. Yes.

75 Mr. WELCH. And not in the name of the corporation?

Mr. BURDEN. And not in the name of the corporation.

Mr. WELCH. And I mean, by "trustees," the directors; in other words, that this action should have been brought in the name of the directors and not in the name of the company, and that it is fatal to our claim to have it brought in the name of the company, but you do not claim that the directors should be brought in here and be made a party with the corporation?

Mr. BURDEN. No. We concede that the later act, as you contend, must govern as to corporations dissolved since its passage, but this corporation was dissolved, as your complaint sets out, on December 30th, 1920, more than two years before.

The REFEREE. And the action was begun before the amendment?

Mr. BURDEN. Yes, sir, and it was more than two years before the passage of the later act, which they allege in their complaint, that they were dissolved. Now, we stand under that, as already stated.

Mr. WELCH. You do not claim section 221 was in effect when we dissolved, but when we brought our action section 221 of the corporation law was in effect.

Mr. BURDEN. Well, I think we can dish this up to the referee in very short briefs.

76 The REFEREE. I will deny your motion for the time being with the right upon your part to renew it at any time during the progress of the case.

Mr. BURDEN. And an exception for the government.

Colloquy between court and counsel

Mr. WELCH. Well, I want this on the record. There is nothing in the pleadings, no claim here, that the directors should be added as a party plaintiff?

Mr. BURDEN. Well, I will read our answer to you on that.

Mr. WELCH. There is no claim here—I supposed we had it on the record—no claim here made that the directors should be added with the plaintiff as a party plaintiff.

Mr. BURDEN. Our position is this: That the real party in interest is not suing the Government; and we go further in our brief and say that the real parties in interest are not here before the court. That is broad enough, isn't it?

Mr. WELCH. Well, I will proceed. I will offer in evidence a certified copy of the plaintiff's income and profits tax return for the fiscal year ending May 31st, 1919. I offer also as attached to it the plaintiff's claim for refund, together with the schedules attached to both.

Mr. BURDEN. And to that the defendant objects upon the ground that no proper foundation has been laid for the testimony and that it is inadmissible under the pleadings, that it is incompetent, irrelevant, and immaterial; upon the further specific ground that no claim

7 for deductions for obsolescence of good will is yet authorized by the revenue acts of the United States.

The REFEREE. Did you give the stenographer the date of filing; when they were filed with the Government?

(Discussion outside the record.)

Mr. WELCH. Filed with the Commissioner of Internal Revenue, November 23rd, 1922. They are all together and can be marked as one exhibit.

The REFEREE. Objection overruled. I will receive it in evidence subject to your right to move to strike it out at any time.

(Corporation income and profits tax return, claim for refund, and schedules attached received in evidence and marked "Claimant's Plaintiff's Exhibit No. 1," of this date.)

Mr. WELCH. There are some things here probably we can stipulate and agree upon:

"That the national prohibition amendment was adopted by the Senate by a vote of 65 to 20 on August 1, 1917," ——

The REFEREE (interrupting). Let us stop there. Will that be agreed upon?

Mr. BURDEN. If the court please. Here is my defense. I have always refused to agree with Mr. Welch on that stipulation. He has got the history of the Volstead Act there in good shape, but we do not want to concede on the part of the Government certain dates in there and certain things which he has interpolated, and, therefore, if he will put in one, two, three, four form, what he
78 wants to state, we will take it up and try to do it, but I cannot do it now. We have got to check it up. I do not know what you want, but if you will just read out what you want we will see if we can agree to it; but leave out your deductions and your historical references to the Volstead Act and just say such things as you want and we will try later to agree with you. It is just a matter of dates that I want.

Mr. WELCH. And that is all I want.

Mr. BURDEN. The way I want to handle this case in that regard is to have the Treasury Department men check that up and if it is all right, we will agree to it, but we are not going to concede your historical conclusions or deductions, and so forth, as to the purposes of the Volstead Act.

Mr. WELCH. No. There are many rulings of the Treasury Department of the Government.

Mr. BURDEN. Just give us a list of those and let the experts check them up.

Mr. WELCH. As to those rulings, will the court take judicial notice of them; are they to be used the same as if put in evidence, or must we put them in? There is, for instance, the proclamation of the President. I think, if I might run through this, you could check it up as we go through it.

The REFEREE. Why don't you read your proposed stipulation to the stenographer and then let Mr. Burden check it up afterwards and find out how much he will agree to?

Mr. WELCH. All right. I will do that.

79 "That the national prohibition amendment was adopted by the Senate by a vote of 65 to 20 on August 1, 1917, and on

December 17th, it was adopted in the House with slight changes, by vote of 282 to 128. These slight differences were adjusted and the amendment was finally adopted by both Houses on December 18, 1917.

"During the year 1918, seventeen States were in session prior to June 1st. Of these seventeen, the following twelve ratified, with the following votes:

	Senate	House
Missouri (Jan. 8)	28— 5	93— 3
Virginia (Jan. 10)	30— 8	84—13
Kentucky (Jan. 14)	28— 6	66—10
South Carolina (Jan. 18)	28— 6	66—29
North Dakota (Jan. 25)	43— 2	96—10
Maryland (Feb. 13)	18— 7	58—36
Montana (Feb. 19)	35— 2	77— 8
Texas (Feb. 28)	15— 7	72—30
Delaware (Mar. 18)	13— 3	27— 6
South Dakota (Mar. 19)	43— 0	86— 0
Massachusetts (Apr. 2)	27—12	145—91
Arizona (May 23)	Unanimous	29— 3

"Of these States, three—that is, Delaware, Maryland, and Massachusetts—had repeatedly, in recent years thereto, voted wet in local elections.

"During the latter part of 1918, the following three States adopted the amendment by the following votes:

	Georgia (June 26)	34— 2	120—24
80	Louisiana (Aug. 6)	21—20	69—41
	Florida (Nov. 27)	25— 2	61— 3

"During the year 1919, in two weeks from January 2nd to January 16th, twenty-one States ratified by similar votes, and on this latter date thirty-six States had ratified it and the amendment became a part of the Constitution. Within a short time thereafter nine more States ratified, making a total of forty-five States out of forty-eight.

"In T. B. R. 44 the Commissioner of Internal Revenue determined that by January 31, 1918, it had become evident that national prohibition would be a fact and that it would become effective about January, 1920; that the constitutional amendment could not be ratified before January, 1919, because of the fact that a sufficient number of legislatures did not meet until January, 1919; that by its terms the amendment became effective one year after its ratification; that it actually became effective January 16, 1920. In T. B. R. 44 the commissioner adopted as the period for obsolescence of good will of distillers the period beginning January 31, 1918, and ending January 16, 1920.

"On August 10, 1917, C. 53, section 15, 40 Stat. 276,282, as a part of the Lever Act, of food conservation act, the President was given authority to limit the use of foods, fruit, food materials, or feeds in the production of malt or vinous liquors for beverage purposes or to

require a reduction in the alcoholic content as a food conser-
81 vation measure. Under this section on December 8, 1917, 40 Stat. 1728, the President issued a proclamation that on and after January 1, 1918, the total amount of foods, etc., used by any person to produce malt liquor should not exceed 70% of the average consumption of such person during 1917, and that no malt liquor except ale and porter should be produced in the United States after January 1, 1918, containing more than 2.75% of alcohol by weight.

"A further proclamation, dated September 16, 1918, forbade the use after October 1, 1918, of any food stuffs (except malt already made and hops) in the production of malt liquors, irrespective of alcoholic content, and forbade the use after December 1, 1918, of any food stuffs, including malt in the production of malt liquor irrespective of alcoholic content. (Same reference.) A further proclamation was made on January 3, 1919, modifying the proclamation of September 16, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating. This proclamation did not define intoxicating liquor. (Same reference.)

"On November 21, 1918, Congress passed the war-time prohibition act. This provided that after May 1, 1919, and until the end of the war and the termination of demobilization, no grains, cereals, fruit, or other food stuffs should be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous
82 liquor for beverage purposes. It also provided that after June 30, 1919, until the conclusion of the war and the termination of demobilization, no beer, wine, or other intoxicating malt or vinous liquor should be sold for beverage purposes except for export.

"This statute did not define intoxicating liquor. On February 6, 1919, the Commissioner of Internal Revenue ruled that a beverage containing ½ of 1% of alcohol by volume would be regarded as intoxicating within the act. (T. D. 2788.)

"On October 28, 1919, the Volstead Act was passed, which defined intoxicating liquor under the preceding war-time prohibition act as any beverage containing one-half (½) of 1% or more of alcohol by volume.

"The Volstead Act also provided for the enforcement of prohibition under the eighteenth amendment to the Constitution. There was, in fact, no interval between war-time prohibition and prohibition under the eighteenth amendment. The Volstead Act similarly provided that after the effective date of the eighteenth amendment no liquor containing more than ½ of 1% of alcohol by volume could be sold."

Now, with those in it will save a lot of time.

Mr. BURDEN. To date the defendant has been unable to stipulate with Mr. Welch to save the time of the court, but I will refer it to the Solicitor of the Treasury Department and see what we can do with it, after we check it.

83 However, we object to the entire stipulation as immaterial and irrelevant in view of the fact that the ratification by the various States and the adoption of the constitutional amendment has been certified by the Secretary of State and it has already been concluded, so far as litigation is concerned, by a decision of the Supreme Court as we understand it. Now, we regard it as immaterial in this case to go into the history of the Volstead Act in any way.

Mr. WELCH. If you will concede the fact, I will consent to your objection that they are immaterial.

Mr. BURDEN. I take it that it is not material. We claim here that they are not important. We think the court can take judicial notice of certain of Mr. Welch's contentions here, but the proposed stipulation that Mr. Welch asks to stipulate runs into a lot of dates which we would want to classify before we stipulated as to whether or not they are material. While they might be material, still again they might not be material and would only tend to becloud the record.

The REFEREE. I will withhold any decision on that until you have determined whether or not you can stipulate it.

Mr. WELCH. Now, here is another thing. I want to put in that section 221 of the corporation law, and I will also want to put in the different statutes, no doubt, that relate to the liquor tax certifi-

84 cates, and so forth, of this State. I will submit that I am not very familiar about the holdings of United States Supreme Court on these questions, and I don't want to take any chances, and I want to offer them in evidence now, or if we can have a general stipulation that all the statutes of the State of New York relating to liquor tax certificates, or the breweries, or anything else, are to be considered in evidence, and the corporation law.

The REFEREE. Off the record.

(Discussion outside the record, which the stenographer was directed not to take.)

Mr. BURDEN. The Solicitor for the Treasury Department objects on the ground that there is no necessity for it, because the courts all the way up have taken judicial notice of such things.

The REFEREE. You both agree that the referee can take judicial notice of the statutes and laws of the State of New York?

Mr. BURDEN. Yes.

Mr. WELCH. Yes, sir, and such parts as are necessary and may be considered in evidence. Now, that takes care of the New York law. Now, as to the rulings of the department.

Mr. BURDEN. Yes. We can get together on that.

The REFEREE. Now, what is next?

Mr. BURDEN. Now, if I may interpose at this time, that all admitted or proposed or actual stipulations on the record are made without prejudice to our objection and our motions hereafter
85 made, and decisions, I assume, which are being held by your honor.

The REFEREE. Subject to objections to be made hereafter.

Mr. BURDEN. And subject to rulings to be made hereafter.

The REFEREE. Yes; that is true. Off the record.

(Discussion outside the record, which the stenographer was directed not to take.)

We will now adjourn until two-thirty o'clock this afternoon.

(Adjournment taken until two-thirty p. m., same date and place.)

Afternoon session, Syracuse, New York, post-office building, Monday, June 29th, 1925, two-thirty p. m.

Presiding: Honorable James J. Barrett, referee.

Appearances: Same as before.

Mr. WELCH. I offer in evidence the articles of incorporation of the Haberle Crystal Spring Brewing Company, filed with the secretary of state on May 23rd, 1892, the payment of the tax on that day, and filing in the county clerk's office of the county of Onondaga on the 26th day of May, 1892.

I have here the originals from the county clerk's office and I wish to have a copy substituted in place of these so we won't take them out of the county clerk's office.

86 There is one section that I wish to note on the record, and that is that the amount of capital stock is $800,000.00 and there were eleven directors, and the business or object for which said corporation is formed, reading from section 2 of it, " is the manufacture and sale of lager beer, ales, and porters, the making and selling of malt and the purposes of a general brewing business."

The REFEREE. Is there any objection to the certificate?

Mr. BURDEN. None that I know of.

The REFEREE. Received in evidence.

(Certificate of incorporation, etc., received in evidence and marked " Plaintiff's Exhibit No. 2," of this date.)

Mr. WELCH. I offer in evidence the certificate of the secretary of state of the State of New York, dated December 23rd, 1920, and filed in the Onondaga County clerk's office on the 31st day of December, 1920, at 3.27 o'clock p. m., and recorded on the same day in Book II of Miscellaneous Records at page 595.

The REFEREE. If there is no objection, it will be received.

(Certificate of the secretary of state, dated December 23rd, 1920, received in evidence and marked "Plaintiff's Exhibit No. 3," of this date.)

Mr. WELCH. I wish to read it into the record:

Plaintiff's Exhibit 3

STATE OF NEW YORK,
Office of the Secretary of State, ss.:

87 This certificate issued in duplicate hereby certifies that the Haberle Crystal Spring Brewing Company, a domestic corporation, has filed in this office on the 23rd day of December, 1920, papers for the voluntary dissolution of such corporation under section 221 of the general corporation law, and that it appears therefrom that such corporation has complied with said section in order to be dissolved.

Witness my hand and seal of office of the secretary of state, the city of Albany, this 23rd day of December, one thousand nine hundred and twenty.

A. B. PARKER,
Deputy Secretary of State.

And then the seal of the secretary of state, seal of the State of New York on it..

Mr. BURDEN. That is in accordance with the dates alleged in the complaint, is it not?

Mr. WELCH. Yes, sir.

Mr. BURDEN. Now, we do not desire to be technical, and I assume that the court will take cognizance of the papers filed for the dissolution under section 221, if the Government desires to offer them. In other words, this simply certifies as to some papers. You do not offer the papers?

Mr. WELCH. No. That is all that was filed. They are filed in Albany.

Mr. BURDEN. Our position is that probably we should object on the ground that no proper foundation has been laid for its admission, and it is incompetent and irrelevant by reason of that.

88 The REFEREE. I said heretofore that the exhibit was received in evidence. I did not know it was going to be objected to.

Mr. WELCH. I think the law makes that certificate evidence itself. I am not sure, but I think it does.

The REFEREE. You mean you want him to prove the process by which the corporation was dissolved in order to get to this certificate; is that the foundation?

Mr. BURDEN. Yes, sir. We, of course, rely upon the contentions we have heretofore made. Now, the question is whether whatever was done prior to receivership, or otherwise, leaves the directors of that kind of a dissolution still acting for the corporation under the statutes and under the points raised this morning.

The REFEREE. Of course, that objection holds in time, but the objection you make now is that no proper foundation has been laid for this certificate; that is, you ask the plaintiff to prove each step of the dissolution proceedings to get this certificate?

Mr. BURDEN. We want to know just what he did. We think that should be shown here.

The REFEREE. I think there is something to that objection and I think you ought to call an officer of the corporation to show just what has been done.

Mr. WELCH. I will state this: That we complied with the
89 provisions of section 221, and under that law the corporation is dissolved on the filing of that certificate in the county clerk's office where the corporation does business.

Mr. BURDEN. I understand that.

Mr. WELCH. And the only way to dissolve it under that section is by filing the necessary papers which the secretary of state says is sufficient.

Now, do you raise any further technical objections? If you want copies of the papers filed in Albany, we will give them to you.

The REFEREE. Well, you can reserve your right to offer them in evidence later. The reception of the exhibit in evidence will stand subject to that reservation.

Mr. WELCH. Now, I will call Mr. Biehler

FRANK C. BIEHLER, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Biehler, you reside in the city of Syracuse?

A. Yes, sir.

Q. And have for a great many years; in fact, you were born here, weren't you?

A. No; I was not born here, but I have lived here since I was two years old.

Q. Now, you were connected with the Harberle Crystal
90 Spring Brewing Company, the plaintiff in this action, as what on its dissolution?

A. Treasurer.

Q. Treasurer?

A. Yes, sir.

Q. And you have been its treasurer for some years?
A. Yes, sir.
Q. And were you also a director?
A. I was.
Q. And how long had you been with it?
A. You mean with the company?
Q. Yes.
A. Up to this time?
Q. No; I mean from the beginning. Were you with it when it was organized?
A. Yes, sir.
Q. What was your business with it when it was organized?
A. I was a bookkeeper in the office.
Q. For some time?
A. Yes, sir.
Q. And then you became a director and finally wound up with the treasurership?
A. Yes, sir.
Q. So you are familiar, I assume, with the business of this company from the time that it started in?
A. Yes, sir.
Q. And did it start in in business in 1892?
A. It did.
Q. And that company was formed how; by the merger of some other breweries, or what, or how?
A. By the merging of the Haberle Brewery with the Crystal Spring Brewery, both manufactures of beer alone.
Q. Now, the Haberle Brewing Company, before its merger, where was that situated?
A. 500 Butternut Street.
Q. In the city of Syracuse?
A. Yes, sir.
91 Q. And 500 Butternut Street is about how far, would you say, from the center of the city, from the swing bridge, what is called the center of the city?
A. Why, three-quarters of a mile, and maybe a little more.
Q. Now, where was the Crystal Spring Brewing Company situated?
A. 1000 Burnet Avenue.
Q. Now, what did you make in those two breweries?
A. We made lager beer, exclusively; nothing but lager beer.
Q. In each one?
A. In both of them at that time.
Q. And then, in 1901, what happened?

A. We purchased the National Brewery, which was then on State Street, and the Karney Brewery, which was at the corner of Wolf and North Salina Streets.

Q. And those were two ale breweries?

A. Exclusively.

Q. And, then, on the purchase of those two breweries by the Haberle Crystal Spring Brewing Company, what happened?

A. Why, we continued to make ale in those two breweries for a year or two, and then we transferred all the ale business to the Crystal Spring plant on Burnet Avenue and moved the lager business from the Crystal plant to the Haberle plant on Butternut Street.

Q. So that, thereafter, you made lager beer in the old Haberle plant on Butternut Street and in the Crystal Spring Brewing Company you made ale, in the old Crystal plant?

A. Exactly.

92 Q. Now, can you tell us something, Mr. Biehler, about these two plants; about the amount of land and the buildings; you have got a map there with you?

A. Yes, sir.

Q. Start in with the Haberle plant. You have got a map there, did you say?

A. Yes. I would like to have a ruler. I cannot remember these figures. These maps are drawn by scale. I can give you the approximate measurements but I cannot give them exactly.

Q. The map you have there, do you know who made that map?

A. No; I do not.

Q. It has been in the brewery for some time?

A. Yes. I don't know who did make it. They are very old.

Q. And the map you have there is drawn to a scale; is it indicated by scale there of one inch to twenty feet?

A. Yes, sir.

Q. And in your opinion that is a correct representation of the Haberle plant; is it?

A. Yes. I know it to be correct. We have had other maps, but this seems to be the best one.

Q. Does it show the buildings on there?

A. Yes, it shows all the buildings.

Q. And does it show or indicate what was in that building or buildings?

A. Well, it doesn't indicate what was in there.

Q. Well, first give us the land dimensions on Butternut Street and some idea of the plant?

A. Well, I would call it 360 feet on Butternut Street.

Q. And that is at the corner of Butternut and what other street?

A. McBride.

93 Q. And, now, how much on McBride Street?

A. About 260 feet.

Q. And then does it run back to the east a distance from McBride Street?

A. About in the middle section, in the center there, it runs back into the other street.

Q. What other street?

A. Laurel Street.

Q. So, it runs through from Butternut Street to Laurel Street, and the lines form somewhat of an L, do they not, a double L?

A. Yes.

Q. How deep is it from Butternut Street to the street in the rear?

A. About 480 feet.

Q. And how far is it from the jog in Laurel Street? What street is that [indicating on map]?

A. Laurel Street is over here [indicating].

Q. I mean west?

A. McBride Street.

Q. McBride Street. How far is the jog in there, running back from McBride Street?

A. To Laurel?

Q. Yes.

A. 220 feet.

Q. And how far does that extend east from McBride Street, measuring from McBride Street back to this line here to which you have referred?

A. About 190 feet.

Q. Now, I wish you would go on and tell us something about the buildings that are on there.

A. Well, there is a five-story building on Butternut Street.

Q. Brick or wood?

A. Brick. It is about 230 feet long and 120 feet deep, and it is not all one building; there are jogs in here.

94 Q. And what was in this building?

A. And then there is another building on Butternut Street, and that is 60 by 220.

Q. And what is that, the bottling works?

A. It was used as the bottling department. Do you want the buildings in the rear?

Q. Yes. What are they?

A. Well, the stable, 70 by 120; and then there is a building in the rear, that is 40 by 101. I know that to be right; and there is a garage 80 by 40; and there are wooden buildings here, 30 by about 120; and two dwellings.

Q. Now, tell us something about what was in these rooms or different buildings.

A. Well, the front building here, of course, is the office building, on the corner.

The REFEREE. What street is that?

The WITNESS. On Butternut, corner of McBride; and then the next building here was the brewhouse, that building [indicating], and the rack room and fermenting room, fermenting tuns.

By Mr. WELCH:

Q. How many fermenting tuns?

A. I think there are 29. I am not sure.

Q. These are tuns—t-u-n-s?

A. Yes, sir.

Q. Now, what was done with those fermenting tuns; what are they used for?

A. Why, for the fermenting of beer, in normal times, when we made beer.

Q. And what else was in it?

A. Well, that is about all they could be used for.

95 Q. And I suppose you had your storeroom?

A. Well, then, we have storage tanks in the other building here. They were closed tanks. The fermenting tanks were open tanks.

Q. Now, those tanks, how many tanks did you have?

A. Well, we had equal to thirteen thousand barrels. They were in different sizes, and all glass and enameled, in this building; and then, this building here, in there we had something like fifteen or twenty thousand barrels of wooden casks.

Q. Those big vats?

A. Well, they were wooden casks; some were closed and some were open; and our boiler room was in here and our engine house, power house.

Q. And you had a cooperage there?

A. The cooperage was over in here and the garage here [indicating on map].

Q. Now, get down to the National plant and tell us something about that along the same line.

Mr. WELCH. I think I will offer that map in evidence.

Mr. BURDEN. There is no objection to the map on account of the foundation laid, but we object to it as incompetent and inadmissible under the pleadings, so far as attempting to relate it to the obsolescences.

The REFEREE. There is no objection upon the ground that there is no proper foundation for it?

Mr. BURDEN. No, not the technical objection

96 The REFEREE. Objection overruled. It will be received.

Mr. BURDEN. An exception.

(Map received in evidence and marked "Plaintiff's Exhibit No. 4" of this date.)

By Mr. WELCH:

Q. Now, give us the dimensions of the other one, Mr. Biehler, as near as you can.

A. Well, there is about 240 feet on Burnet Avenue. Just a minute, I think I have got that. Burnet Avenue has been laid down here in dimensions. We advertised that for sale. [After looking for paper.] No; I haven't got that here. That is not the one. It is about 240 feet on Burnet Avenue.

Q. On Burnet Avenue, 240 feet?

A. Yes, sir.

Q. Proceed.

A. 220 feet on Vine Street.

Q. Yes.

A. 130 feet on Sherwood Avenue.

Q. Now, are there buildings on it?

A. Now, there is a five-story brick building on Burnet Avenue, and there is a four-story brick building on the north side of the rear tract between this and Sherwood Avenue; and then there is a three-story brick building north and adjacent to that building, about sixty by seventy one Vine Street; and another one, fifty-nine by ninety-one; I know these dimensions, because we are working on them now; and then on Vine Street there is a stable, forty by fifty-five feet, and sheds, thirty-five by one hundred feet, some small sheds in the rear; and there is a garage thirty by fifty feet.

97 Q. That used to be a barn?

A. No. That is the garage and was used as such. The stables are in here [indicating on map]; and then there is another building about thirty-five by thirty-five feet, somewheres around there. Those are only approximate figures. I do not pretend to have them right.

Q. The main buildings, they are of brick; are they not?

A. Yes.

Q. Have you a map there, that you have before you, that you are giving these dimensions from?

A. Yes, sir.

Q. Do you know who that was made by; have you any record of that?

A. No. The maps were evidently made at the same time by the same company. There is an initial on there but I couldn't find out what it was.

Q. And does it purport to be drawn to a scale of one inch equal to twenty feet?

A. Yes, sir.

Q. And that is a fair representation of the land and buildings?

A. Yes, sir.

Mr. WELCH. I offer this map in evidence.

Mr. BURDEN. Same objection as to the last exhibit.

The REFEREE. No objection upon the ground of no proper foundation laid for it?

Mr. BURDEN. No, and not as to the accuracy of the map.

The REFEREE. You object to it as immaterial and so forth?

Mr. BURDEN. Yes.

98 The REFEREE. Objection overruled. The map is received in evidence.

Mr. BURDEN. An exception.

(Map, National Brewing Company, received in evidence and marked "Plaintiff's Exhibit No. 5," of this date.)

By Mr. WELCH:

Q. Now, you may give us what was in this plant in a very general way, that is, what was made there, and what machinery was there.

Mr. BURDEN. We want to object to the machinery. We object to that on the ground that no proper foundation has been laid for the admission of evidence as to obsolescence in reference to the machinery, and incompetent, irrelevant, and immaterial and not within the issues of the case.

The REFEREE. Is there any claim here that there was obsolescence as far as the machinery is concerned?

Mr. WELCH. Why, I think there will be, your honor. Of course, there is probably several ways. Your honor may select a way of figuring out obsolescence that is different from any one of us.

The REFEREE. Yes, I know. I was just wondering. Is that set up in the pleadings, or pleaded generally? Well, without further discussion, I will overrule the objection for the time being.

Mr. BURDEN. An exception.

99 By Mr. WELCH:

Q. What was in that building?

A. Well, there was a brew house on the north end, consisting of a kettle and mash tub and brewing appliances, and small scales and such things as were needed in the brew house; and coolers, tanks, and fermenting tanks.

Q. Tell us something about the tanks; tell us what size?

Mr. BURDEN. We ask for the same objection to these questions; this line of questions.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

By Mr. WELCH:

Q. Proceed?

A. There was about five thousand barrels of glass enameled tanks there, and about eight or nine thousand barrels of wooden tanks; and there was carbonators, filters, gas-collecting outfits, all complete for the manufacture of ale; and there was boilers, ice machines, all air appliances, and an ice-making plant—well, in fact, all of the machinery that is needed in a brewery. If you care, I can go ahead and give you the list in detail, every item, if you want it.

Q. Now, you stated that in 1904, as I recall your evidence, that you started in the making of lager beer on Butternut Street in the brewery there, and the making of ale down at the National plant on Burnet Avenue. Now, did the business continue under the same operation until October 28th, 1919, when the Volstead enforcement law became effective?

100 Mr. BURDEN. We object to that on the ground that the good will is not an issue in this case, and immaterial and irrelevant and incompetent under the pleadings.

The REFEREE. The good will is specifically mentioned in the complaint; is it not?

Mr. WELCH. Yes.

The REFEREE. It is mentioned in the complaint. I will make the same ruling. Objection overruled.

Mr. BURDEN. An exception.

The WITNESS. The Haberle plant was operated for the exclusive manufacture of lager beer, made nothing else but lager beer, and the National plant was operated in the exclusive manufacture of ales and porters, from 1904 until the advent—well, until along some time in October, 1919, and then the National plant was abandoned entirely.

Mr. BURDEN. I will now move to strike out the answer upon the grounds stated in the objection, and upon the further ground that it is not within the issues of the case.

Mr. TOOMEY. And the defendant further objects upon the further ground that it is shown in paragraph fourteen of the plaintiff's second amended complaint——

Mr. WELCH (interrupting). Second amended complaint?

Mr. TOOMEY. Well, which one is it, the second or third?

101 Mr. WELCH. Get the last one, the one verified January 7th, 1925.

Mr. TOOMEY. That is all right. That is the one. Paragraph fourteen of the amended complaint shows on its face they are seeking the recovery of $19,062.95, taxes alleged to have been erroneously

assessed and collected, and where it is further alleged that the tax results from the disallowance of $98,790.48 on outside real estate, good will, and intangible assets owned by the plaintiff; whereas the very first exhibit introduced in this case by this plaintiff shows that the tax herein sued for results from the disallowance of $98,790.48 on outside real estate, good will and intangible assets not being included therein, and for that reason defendant contends that the matters of good will, obsolescence of good will, intangible assets are not properly in issue here, and for a more specific reason we repeat what we have already said, that the tax herein sued for, as shown by the evidence already introduced, resulted from disallowance of depreciation on outside real estate alone.

The REFEREE. Well, that is the same general objection that you have been making right along; is it not?

Mr. BURDEN. No. That is the converse of what we made heretofore.

Mr. TOOMEY. The position announced in our opening state-
102 ment was that we would object to any evidence on the ground of disallowance of depreciation for the reason that it was not claimed in the taxpayer's claim for refund. Our objection now is to any evidence on the question of disallowance of obsolescence of good will and other intangible assets, for the reason that the pleadings show on their face that the tax herein sued for resulted, not from the disallowance of good will, or to the disallowance of obsolescence of good will, but from the disallowances of depreciation.

The REFEREE. Well, I will receive the evidence subject to your motion later to strike it out.

Mr. BURDEN. And an exception to the Government.

By Mr. WELCH:

Q. You say that the Haberle plant on Butternut Street was operated for the making and manufacture of lager beer up until October 28th, 1919, when the Volstead enforcement law became effective?

A. Yes, sir.

Mr. BURDEN. Same objection, if your honor please.

The REFEREE. Same ruling.

Mr. BURDEN. An exception.

By Mr. WELCH:

Q. And the National plant on Burnet Avenue, was that operated for the manufacture of ale up until that time?

103 Mr. BURDEN. Same objection.

The REFEREE. Same ruling. Objection overruled.

Mr. BURDEN. An exception.

The WITNESS. Up until that time; yes, sir.

By Mr. WELCH:

Q. Now, was there any ale made at the National Brewing Company plant, at the National plant on Burnet Avenue, after October 28th, 1919?

Mr. BURDEN. Same objection.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

The Witness:—There was no ale made at the National branch after October, 1919, of any kind.

By Mr. WELCH:

Q. Now, then, from October 28th, 1919, the time that the Volstead law went into effect, up until the 31st of December, 1920, what was done at the Haberle Crystal Spring Brewing Company plant on Butternut Street?

Mr. BURDEN. Same objection.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

The WITNESS. Why, we made soft drinks up there, such as birch beer and ginger ale and orange cheer and lemon lime and root beer and a cereal beverage.

By Mr. WELCH:

Q. And that was commonly called a near beer?

A. A near beer; yes, sir.

104 Mr. BURDEN. Without constantly interrupting, may we have the same objection and same ruling and same exception noted on the record to all this evidence that pertains to this subject?

The REFEREE. Wherever it applies; yes.

Mr. BURDEN. And an exception?

The REFEREE. Yes.

Mr. BURDEN. That is perfectly proper, and now we are trying to direct it to loss of good will and loss of plant and machinery and loss of inside real estate, and without attempting to lumber up the record, we want to stand on that objection to these questions.

The REFEREE. You may have your objection and the same ruling to be made, to every question to which in your judgment the objection applies.

Mr. BURDEN. Yes, sir, and an exception.

The REFEREE. And an exception to the Government.

By Mr. WELCH:

Q. Now, what was this near beer made from?

A. Well, we had several methods of making it; about that time our method was to make and use what was known as a checked fermentation. We would check the fermentation of the liquor after the

grain juice was squeezed from the grain, and that continued—we continued that for a while, and then we purchased a nonfermentable material and made it from that; and then after that we used
105 the regular grains and made the regular beer and dealcoholized it.

Q. Now, did you ever make some from dealcoholized lager beers?

A. Yes, sir.

Q. From syrups?

A. Well, we made it from a manufactured syrup that was made for that purpose, bought from the manufacturer, unfermentable.

Q. Now, did you ever make any out of ale?

A. No, sir.

Q. Never made any soft drinks out of ale?

A. No, sir.

Q. So that the entire business of the National Brewing Company branch was automatically wiped out when the Volstead law became effective on the morning of October 29th, 1919?

Mr. BURDEN. That we object to.

Mr. WELCH. I withdraw the question.

By Mr. WELCH:

Q. You did not make any more near beer out of ale?

A. No, sir.

Q. I mean, after that date?

A. No, sir.

Q. And you did not brew any more ale down in the National plant?

A. No, sir; we did not.

Q. But the plaintiff on its Butternut Street plant, or in its Butternut Street plant, have continued to make and sell soft drinks there?

A. Yes, sir.

Q. Now, can you tell us the difference between ale and lager; how it is made?

A. Why, the manufacture of ale and lager is almost identi-
106 cal up to the point where they go to the fermenting tub, and then a different barrel is used; one ferments at the top and the other ferments at the bottom.

The REFEREE. Which is which?

The WITNESS. The ale ferments at the top and the lager ferments at the bottom, and for that reason we do not make near bear from the ale; it is preferable to make it from the lager.

By Mr. WELCH.

Q. What were lager beer and ale made of?

A. Why, it is made from malt, hops, sugars, and that is about all.

Q. What kind of malt?

A. Barley malt.

Q. How is it made?

A. Well, the malt is first placed into a—and there is a malt or corn used, sometimes in connection with one another and together, and it is put into a mash tub, a big tub known as the mash tub which has rakes at the bottom, and in the boiling of the mash these rakes revolve and stir up the malt so it does not burn at the bottom, and after the malt is thoroughly dissolved and everything taken out, it is run into a brew kettle where hot water is usually provided and after the malt is in there a certain time and certain heats are reached, why, then, the hops are added and after that it goes to the coolers, first to what is known as the boudolet cooler and then to a large surface or flat cooler, usually on the roofs of the buildings,
and from there it flows by gravity into the fermenting tuns,
107 where the yeast is added, and it is allowed to remain there
sixty to eighty hours, and from there it goes into the storage tanks. The lager is generally kept from three to four months and the ale about two weeks to twenty-one days at the longest. After that it is taken down into the cellars and filtered and carbonated, and it is ready for sale; and there you have got your beer.

Q. What is the capacity of the Haberle brewing tank?

A. Why, our kettle is 12,000 gallons and the mash tub is 12,000 gallons.

Q. And what is the mash tub?

A. 12,000 gallon mash tub.

Q. And what are the capacities of the National?

A. Well, that is about—let's see. They must be nine or ten thousand gallons each, mash tub and kettle.

Q. Now, how is this near beer made; is that made in different ways?

A. Why, yes, by several different methods. The checked fermentation is one method.

Q. Well, what is that?

A. Well, generally, nonfermentable grains are used, which are fermentable up to a certain extent, and then some secret stuff is used to check the fermentation. I could not tell you what it was. The brewer would not tell us, but they say it was used to check the fermentation so there would be no alcohol.

Q. Have you used several methods in making your near beer?

A. Practically all of them, I guess.

108 Q. What is it?

A. Practically all of them.

Q. Now, your ale trade and your beer trade, how did they correspond; what percentage was ale and what beer, while you were in the business?

A. Why, our sales run about even.

Mr. BURDEN. Just a second. That is objected to on the grounds stated originally.

I withdraw the objection.

By Mr. WELCH:

Q. Have you got the barrelage for each year?

A. Yes.

Q. What are they?

Mr. BURDEN. Wait a minute. I object to that.

Mr. WELCH. I will waive that for the time being, unless you have got it there handy. I will withdraw that and I will ask another question and come down to that later.

By Mr. WELCH:

Q. Now, Mr. Biehler, the company kept a set of books; did it?

A. Yes, sir.

Q. From the time that they were organized up to the time that they went out of business?

A. Yes, sir.

Q. And since?

A. Yes, sir.

Q. And were those books correctly kept?

A. Yes sir.

Q. Now, I wish you would tell me, give me the quantity of products sold for five full years prior to March 1st, 1913?

A. Now, what is the question?

109 Q. Show for five years prior to March 1st, 1913, the quantity of products sold.

A. Do you want the total for five years or each year separately?

Q. Each year separately.

Mr. BURDEN. May we have the same technical objection that we have stated at the beginning of Mr. Biehler's testimony, as to obsolescence, and so forth, and now we desire to add to the objection that no proper foundation has been laid in the pleadings for the testimony, and that it is not within the issues of the case, if any issues are left; and in this connection will the court permit me to ask a preliminary question?

The REFEREE. Certainly.

Mr. BURDEN. These are the same books as those upon which the representatives of the Treasury Department have made these various audits and assessed these various taxes to which you object; are they?

The WITNESS. Yes, sir.

Mr. BURDEN. In order that our objection may be intelligent and not annoy the other side, may we ask just the specific purpose of the testimony as a whole, from this point on, relating to the books?

Mr. WELCH. Why simply in a general way to lay the foundation to get our money back.

The REFEREE. This, as I understand it, is simply a history?

110 Mr. WELCH. Showing the whole facts. Of course, we expect to show all the facts.

The REFEREE. Do you object to this evidence upon the ground that the books are not in evidence?

Mr. BURDEN. No. We do not desire to be technical.

The REFEREE. Or that the facts are not material?

Mr. BURDEN. That is why I asked the specific question.

Mr. TOOMEY. We want to know if this question here, calling for the earnings——

The WITNESS (interrupting). Sales.

Mr. TOOMEY (continuing). If that is laying the ground work for a proper valuation of good will, or something of that sort?

Mr. WELCH. I should think so. It is one of the bases of it, anyway.

Mr. BURDEN. And we make the same objection on that statement of counsel.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

By Mr. WELCH:

Q. Show for the five full years prior to March 1st, 1913, the quantity of the products sold?

Mr. BURDEN. The same question is repeated on the record and the same objection, and I assume the same ruling and exception?

The REFEREE. Yes.

The WITNESS. 770,906 6/8 barrels.

111 Do you want that in dollars and cents also?

By Mr. WELCH:

Q. Yes. Will you give the gross?

A. It is 770,906 6/8 barrels; that is from March 1st, 1909, to March 1st, 1913.

Q. And have you got the gross and net earnings for the first year?

A. Yes, sir. Do you want the amount in dollars and cents or the barrelage?

Q. Now, have you the facts for the five years; that would be commencing 1908, I believe.

Mr. BURDEN. I assume we are having the same objection without stating it?

The REFEREE. Yes; that arrangement continues.

Mr. WELCH:

Q. Now, take the first year; what is that, 1908 or 1907; take 1908, the gross sales and the gross and net earnings of that year; have you got them all right there together?

A. Yes, sir.

Q. Give us the sales for that year and the gross and net earnings for that year.

A. The sales from March 1st, 1908, to March 1st, 1909, were 133,360 6/8 barrels; and you want the net earnings?

Q. The gross earnings and the net earnings, one after the other.

A. Yes, I have got the net earnings here.

Q. What is the gross?

A. I have got the gross sales, but not the gross earnings. I mean, I have got net earnings and gross sales. Do you want the gross sales?

112 Q. Have you got the number of barrels?

A. I just gave them, 133,360 6/8 barrels, or $906,144.61.

Q. And this last figure you gave is the gross sales?

A. Yes, sir.

Q. And what is the net earnings?

A. The net earnings for that year?

Q. Yes. Have you got them handy?

A. Yes. That is, for the year ending May 31st, 1909.

Q. That is right.

A. $110,803.81.

The REFEREE. You mean those are the net earnings for that time?

The WITNESS. Those are the net earnings for that one year, and that was the smallest one of the five.

By Mr. WELCH:

Q. And now, the next year, give us the same for the next year.

A. The next year, the sales were 140,841 6/8 barrels, or $948,991.45, gross sales.

Q. And the net earnings?

A. The net earnings were $122,998.19, net profits.

Q. Now take the next year.

A. From March 1st, 1910, to March 1st, 1911, 153,890 3/8 barrels, amounting to $1,034,827.31.

Q. And the net?

A. The net was $130,174.58.

Mr. TOOMEY. These are for the fiscal years ending May 31st, are they not? You are stating March 1st.

The WITNESS. Well March 1st, I have it here.

113 Mr. TOOMEY. March 1st?

The WITNESS. Hold on a minute. I have got the revenue sales here of March 1st, and also got them on May 1st. You want March 1st?

By Mr. WELCH:

Q. March 1st is what we wanted.

A. But the profits are as of May 31st, and couldn't make much difference in those years.

Q. Well, practically the same?

A. Yes, two monthes difference.

Q. Proceed.

A. Do you want the profits for 1911?

Q. Yes.

A. $130,174.58.

Q. That is the net?

A. That is the net.

Q. Now, then, take the next year.

A. Now, 1912, the barrelage was 170,610 1/8 barrels, or $1,157,-151.96, gross sales, and the profits were $100,664.37.

Q. That is the net?

A. That is the net.

Q. Now, then, next year?

A. The next year was 172,203 6/8 barrels, and the gross sales were $1,200,252.52.

Q. Now, March 1st, 1913?

A. Just a minute. I have got the other here; $145,623.02.

Q. And what was that, the net?

A. The net profits for that year.

Q. Now, then, have you given March 1st, 1913?

A. Yes, sir.

Q. The gross sales?

A. Yes, sir.

Q. And the quantity?

114 A. Yes, sir. I have given the five years. I have already given the total.

Q. How much is the total for those five years?

A. 770,906 6/8 barrels.

Q. And the gross sales?

A. $5,247,367.85.

Q. And the net?

A. And the total profits for the five years—well, these years did not come together as we have them here, Mr. Welch.

Q. You are giving it as of March 1st, 1913?

A. Well, I have not got the total of the ——
Q. (Interrupting.) Well, you have given them separately?
A. Yes, sir.
Q. Now, did you pay dividends?
A. We did.
Q. What?
A. Yes, sir; in 1908, 1909, 1910, 1911, in 1912 and 1913. Of course, our years come together, two years, 1908 to 1909, and 1909 to 1910, for instance; eight per cent in each one of those years for the five years.
Q. And you paid dividends each year up to the time that the prohibition law went into effect?
A. Yes, sir.
Q. And up to the time the Volstead Act ——
Mr. BURDEN (interrupting). What are you asking him about, the dividends?
Mr. WELCH. Yes sir. He said dividends were paid at the rate of eight per cent for each and every year.

By Mr. WELCH:

Q. And how much revenue did you pay to the Government; did you ever figure that out, how much revenue you paid the
115 Government up to October 28, 1919?
A. Yes, sir. I have the total figures right here.
Mr. TOOMEY. Just a minute. I object to that as wholly immaterial.
Mr. WELCH. I will withdraw the question.

By Mr. WELCH:

Q. Now, Mr. Biehler, when you were selling ale and lager, take in the city of Syracuse, you owned certain properties, did you, your company?
A. We did.
Q. And your beer and ale was sold in those properties?
A. Yes, sir.
Q. And I suppose each one of those properties was covered by some agreement to draw your beer and ale?
A. Yes, sir.
Q. And those properties furnished an output for your product?
A. Yes, sir.
Q. I suppose also you had certain powers of attorney over other places?
A. Yes, sir.
Mr. BURDEN. We object to that on the same ground and, further, that it is calling for a conclusion of the witness and not in the record.

The REFEREE. Yes; and it is not the best evidence. I will sustain the objection.

Mr. WELCH. An exception.

I ask to have this paper marked for identification.

(Paper marked "Plaintiff's Exhibit No. 6," of this date, for identification.)

116 By Mr. WELCH:

Q. I show you plaintiff's Exhibit 6, for indentification, being an assignment of a liquor tax certificate and power of attorney over it, and which purports to have been executed by one Miller and Debbold, by John A. Miller, dated or executed, it seems to be, on the 4th day of April, 1913, and I will ask you whether or not your company had a number of those assignments and powers of attorney on March 1st, 1913?

Mr. BURDEN. We object to this upon the grounds stated in the last general objection, with this addition: And, further, not to be technical, but upon the ground that it is no part of the proper claim for obsolescence.

The REFEREE. I will sustain the objection as to the method of proof.

Mr. WELCH. Let me see. I was trying to save time. We will produce the whole bunch of them if you want us to, but I don't want to go to the trouble of offering them all in. I was going to take it up wholesale and then let you check them up, if you want to. They had a certain number of those powers of attorney. Now, we have them all, and the question is whether we bring them all in and put them in evidence, or whether we put in one and say we have so many.

Mr. BURDEN. Suppose you make a schedule and I will submit it to Mr. Toomey, and we won't thouble you on the details.

117 The purpose, Mr. Welch, I take it, is an attempt to show that you are entitled to the allowance of the claim here for obsolescence because of the cancelling of these various contracts with people who drew your beer, by the enactment and enforcement of the Volstead Act. Is that the purpose of the evidence?

Mr. WELCH. Yes, sir.

(Recess taken for a few minutes.)

Mr. WELCH. Mr. Burden, so far as the outside properties were concerned, they were part of the property and when these were shot the value of the property was shot.

Mr. BURDEN. What does it amount to in figures?

Mr. WELCH. I don't know.

Mr. BURDEN. Are you going to prove it in dollars and cents?

Mr. WELCH. Perhaps we can. I don't know how far we can go or what figures we can get.

Mr. BURDEN. Have you got an appraiser to show how much it is worth with and how much it is worth without this?

Mr. WELCH. I suppose so.

Mr. BURDEN. We are inclined to be technical at this time, if your honor please, because it puts the Government to the task of going over each place, if it is going to be proved in dollars and cents.

118 Mr. WELCH. Just a minute. This is, of course, their own property that they controlled. While they owned the property they had agreements and I suppose also powers of attorney over them, and that is most of this outside property than anything else.

Mr. BURDEN. I know what your complaint alleges on that subject, and I know the burden is on you until it shifts and moves, as it is likely it will if we do not look out, and then we will have to prove that your property is worth just as much without good beer as it is with good beer.

Mr. WELCH. We have got a list here.

Mr. BURDEN. And then we get down to figures.

Mr. WELCH. Here is a list of them.

Mr. BURDEN. Well, I assume that it is.

Mr. WELCH. Oh, yes; it is.

Mr. BURDEN. That list of licenses covers, I suppose, the property in Schedule B and outside properties not in that at all, properties they did not own at all.

Mr. TOOMEY. Where they controlled the licenses.

Mr. BURDEN. Yes; controlled the licenses and didn't own the property. And you claim obsolescence in this case?

Mr. WELCH. It is a matter of figuring.

Mr. TOOMEY. Well, your net earnings for the five prior years

119 you have just given gave the profits which were derived, as I understand, from those in existence at that time.

Mr. WELSH. I suppose it went into the profits from those that were in existence then.

Mr. BURDEN. We desire to add further to the objection, and Mr. Toomey will state it.

Mr. TOOMEY. The only materiality that the Government can see at this time of going into this, and the only purpose that it can see, is that counsel for the other side is trying to lay a basis for computing the value as of March 1st, 1913, of the intangible assets of this corporation.

The witness already testified as to what the net earnings of the corporation were for the five preceding years.

Counsel stated in response to a request from us that the purpose of that was—I don't know whether he said the sole purpose, but, anyway, the purpose of it was to lay a basis for valuing the good will. Now, those net earnings included the profits derived from these various licenses. That being true, they are wholly immaterial, and the only basis for a valuation, that the Government can see, a valuation of intangible assets, is to capitalize the net earnings of the corporation for a certain number of years on the basis of its net worth, and that is already in evidence and includes the profits de-
120 rived in these various licenses; and for that reason it would open up an enormous field which would be wholly immaterial.

Mr. WELCH. Well, we certainly are not bound by that statement, and we have got to get evidence before we can figure anything, and, of course, you say the only purpose is——

The REFEREE (interrupting). How is that material on the question of the value of these intangible assets of this corporation on March 1st, 1913; how are they material?

Mr. WELCH. Well, we have got to get at the good will of this and we will show——

The REFEREE (interrupting). Well, you have already shown your net earnings, including the net earnings from these outside places.

Mr. WELCH. No, sir. That is all in the city of Syracuse. That is the whole thing in the city of Syracuse. Now, then, we have got here——

The REFEREE (interrupting). Doesn't that amount of net earnings you have testified to include the earnings from these places for which you have powers of attorney, and so forth.

Mr. WELCH. Yes, sir, and other places too, and later on we will show the value of one of these powers of attorney.

The REFEREE. Do you object to the method of proving this?

121 Mr. BURDEN. Yes. We are obliged to be technical on account of the situation which is presented.

The REFEREE. I will sustain the objection on that ground.

Mr. WELCH. In other words, you want us to offer in evidence each and every power of attorney?

Mr. BURDEN. No. We are obliged here, apparently, to be prepared to check up each item, unless it is included in your net profits, as Mr. Toomey states, because they have checked your net profits as shown by your books——

Mr. WELCH (interrupting). I don't quite get the objection as to manner of proof. Of course, these are one of the main things in the foundation of this question, anyway, these powers of attorney. These are intangible assets that were destroyed by prohibition. In other words, when prohibition comes in it wiped out those powers of attorney. They had a value on March 1st, 1913, of a great many

thousands of dollars. Now, we come down to a point, of course, where under these powers of attorney they controlled the beer in these places, nobody else could sell there.

The REFEREE. Well, we cannot pass on that proposition until they are properly proven.

122 Mr. WELCH. Well, what I want to get at is this: I understood that counsel did not object on the ground that they were not properly proven without I put them in evidence.

The REFEREE. He says he is objecting on that ground, as I understand it.

Mr. BURDEN. We have got to be technical on this.

Mr. WELCH. Very well. I did not quite get that.

The REFEREE. Objection sustained on that ground.

Mr. WELCH. Now, couldn't we get these in and then check them up later?

The REFEREE. Off the record.

(Discussion outside the record which the stenographer was directed not to take.)

The REFEREE. Well, I am going to receive them under the same objection which you have made and the same ruling.

Mr. TOOMEY. We are entering no objection at this time.

The REFEREE. Yes. You have claimed they are immaterial. Now, don't you think these powers of attorney had some value in this plant, or may add something, if they are of any value?

Mr. TOOMEY. The only thing to which they could relate, and we don't want to be ultra-technical, is the valuation of this com-

123 pany's intangibles as of March 1st, 1913. They can prove by the books, as they have already attempted to do, what the net earnings of this corporation were. The net earnings of the corporation include any value and would reflect any value which these various licenses would have; and we are in the dark here also as to what method they propose, or by what method, by what scientific or reasonable method, they propose to prove the value of these various intangible assets, even if material under the pleadings.

Mr. WELCH. We can only do that when we get the evidence in. Of course, there are various ones here. Now, let me state for the benefit of counsel, that here is a power of attorney, that is of value, that had a certain fixed value in this city of Syracuse and experts are able to show that.

The REFEREE. Off the record.

(Discussion outside the record which the stenographer was directed not to take.)

Mr. BURDEN. At the present the defendant does not see any point to negotiating or entering into any check-up, because it cannot see

that they enter into the case at all, and it is our position that you will have to rule on the objection.

Mr. TOOMEY. And let us add to that the further objection
124 that under the law no deductions may be claimed on account of the wiping out of the actual license values attachable to property licensed as a place to sell intoxicating liquors which was effectuated by the enactment of the prohibition amendment. That objection covers everything, I think.

The REFEREE. For the time being, I will overrule your objection as to the materiality of the evidence, and will permit you at the close of the plaintiffs' case to make a motion to strike it out.

Mr. BURDEN. An exception.

Mr. WELCH. Now, then, do you still insist on your objection that it is not the best evidence, or can we go on the judge's ruling?

Mr. BURDEN. No. We prefer to check them over with our real-estate expert, anyway.

Mr. TOOMEY. I think that it is the best way and it will save the trouble.

Mr. WELCH. I don't like to keep you here until State Fair time.

The REFEREE. Off the record.

(Discussion outside the record which the stenographer was directed not to take.)

The REFEREE. Now, as I understand it, this is objected to upon the same ground as heretofore and upon the further ground as immaterial, and also that it is incompetent and inadmissible under the rulings of the department and under the law itself?

125 Mr. TOOMEY. Yes; those are the grounds of the objection.

The REFEREE. Those objections are overruled and with the right reserved to the defendant to move to strike out the evidence at the conclusion of plaintiff's case, or at the conclusion of the defendant's case, or at any time during the trial.

Mr. BURDEN. And we have at present an exception?

The REFEREE. Yes; and an exception to the Government.

Mr. WELCH. Well, then, your honor, I will pass up, under the arrangement with counsel, these powers of attorney, so that they may check them up, and we will get at some other question.

The REFEREE. Proceed.

By Mr. WELCH:

Q. Now, Mr. Biehler, I wish you would go on and tell us something about your trade; where and how did you sell your beer? First, you made larger beer up at the plant on Butternut Street?

A. Yes, sir.

Q. What was the name of your beer?

A. Congress beer, Congress lager.

Q. Congress lager?

A. Yes, sir.

Q. And was your beer advertised in different ways, by signs and over places and on doors and windows, and everything of that kind?

A. Why, it was advertised, yes, generally, in every way, and we used the newspapers.

126 Q. Well, tell us about it.

A. By signs on the road, by different methods of useful things that are used amongst the trade.

Q. Like servers?

A. Yes; like servers, windows signs, windows and doors, glasses, and almost anything you can conceive of, knives and everything else, mirrors.

Mr. BURDEN. I think the motion to strike out the answers to the questions is proper at this time, under the grounds stated in the objection.

Mr. WELCH. What is it, not the best evidence?

Mr. BURDEN. No; on the general ground that it is no proper evidence.

The REFEREE. Your motion, for the time being, is denied, with the right to renew it later on.

Mr. BURDEN. An exception.

By Mr. WELCH:

Q. Did you have those signs over bars?

A. We had signs all over.

Q. Well, what was it; what were the signs; what was the lettering on them?

A. Congress Beer, Syracuse, New York, usually.

Q. Congress Beer, Syracuse, New York?

A. Yes sir; usually advertised the name "Congress Beer" and omitted the name Haberle, except perhaps in small letters at the bottom; we used the word "Congress" generally and our beer was known as "Congress Beer."

127 Q. And was your beer known as Congress Beer wherever you sold it?

A. Wherever we sold it it was known as Congress Lager Beer.

Q. And when you went in and asked for a glass of your beer, you asked for a glass of Congress lager beer?

A. Yes, sir.

Q. And not who made it?

A. No, sir.

Q. And other breweries here, they had their names for their beers?

A. Yes, sir.

Q. Like Par-Ex, and Crown, and The Onondaga, and so on?

A. Yes, sir.
Q. That is, the different breweries had different names?
A. Yes, sir.
Q. Now, just how about the ale, the National ale; how about that?
A. Well, it was sold and advertised in much the same manner, and known as Derby Cream Ale.
Q. And it was advertised in the papers as Derby Cream Ale and over the bars and everything of that kind?
A. Yes, sir.
Q. So that the ale was known as Derby Cream Ale?
A. Yes, sir.
Q. And sold as such and called for as such?
A. Yes, sir.
Q. Now, as to this Congress Beer, you used that name, Congress Beer, and sold your product under that name from the time, or about the time that you were organized, or from 1904, at least?
A. Yes, sir.
Q. Up until the time you went out of business under the Volstead Act?
A. Yes, sir.
28 Q. And your packages were marked "Congress Beer," and your bottles and such as that?
A. Yes, sir.
Q. And your labels?
A. The labels were all marked "Congress."
Q. Your labels were all marked "Congress"?
A. Yes, sir.
Q. Were all your bottles?
A. Yes, sir.
Q. And on your barrels?
A. Yes, sir.
Q. And it was so known where; throughout what part of the State did you deal; where did you sell this beer?
A. Well, we sold it north to the Canadian border, and south to the Pennsylvania line, and east as far as, well, Albany, and west to Rochester and including Rochester.
Q. And it was known by those names in all the territory where you sold it?
A. Always by those two names, the ale and the beer.
Q. And the Derby Cream Ale was substantially the same?
A. Yes, sir.
Mr. BURDEN. I move to strike out the last testimony, consisting of the answers to the last questions relating to the name and trade names, and so forth, upon the grounds stated in the general objection heretofore taken.

The REFEREE. Motion denied for the time being, with the right reserved to you to renew it later.

Mr. BURDEN. And an exception.

By Mr. WELCH:

129 Q. Now, how was this beer sold, in barrels or bottles, or how, Mr. Biehler?

A. Why, it was sold in barrels, the greater per cent sold in barrels, and in bottles, too.

Q. And was it sold generally to saloons and hotels?

A. It was sold to saloons and hotels in the main, and to private homes, and had distributing agencies around which sold it.

Q. And to private homes, I suppose it was a small percentage?

A. Very small, very small.

Q. In other words, you had agents here and there that handled your beer?

A. Yes, sir.

Q. And they sold it?

A. Yes, sir.

Q. And how about your trade here in Syracuse?

A. It was among the saloons here, and we had it among the hotels.

Q. And you made your own deliveries?

A. We made our own deliveries and shipped out to our agencies in these various places.

Q. And that continued from the time that you were organized, I believe from 1904 up to the time of the Volstead Act?

A. Yes, sir.

Q. And your properties and the cost price of all your property was correctly put on your books?

A. Yes, sir.

Q. And continued on your books?

A. Yes, sir.

Q. Now, when and after the Volstead Act went into effect and you discontinued the selling of beer—first, you did discontinue the manufacture of beer when the Volstead Act went into effect and

130 went into the manufacture of soft drinks?

A. Yes, sir.

Q. Now, when you went to making these soft drinks; tell us something about that.

A. Why, when we were selling beer we sold it to these places that were practically owned, or most of which were controlled in some manner or other, and they constituted all our output, practically speaking; that is, we had our method of selling, we either owned a place or controlled it in some manner or other.

Q. Now, let me ask you right there: Was there quite a competition here between and among breweries on these powers of attorneys and liquor-tax certificates?

A. Yes; there was.

Q. And quite a competition here for the trade, was there not?

A. Yes, sir.

Q. Go ahead.

A. And the method of selling was about the same among all breweries; they sold to the places that they controlled, chiefly, and, so when the change came and we got to selling near beer our whole method changed. We had no output and our output was gone. We had to find a new place to sell our stuff. The saloons were gone. They could not handle it; there wouldn't be enough in it, drawing our near beer.

Q. That is, the saloons went out of business locally?

Mr. BURDEN. Now, let me move to strike out the answers to the last few questions relating to the change in conditions after
131 the Volstead Act went into effect, on the grounds stated in the general objections. We do not desire to be technical.

Mr. WELCH. I will modify that a little. I will ask a different question.

By Mr. WELCH:

Q. Now, Mr. Biehler, after the Volstead Act went into effect you have already stated how and where you sold your beer, and that you sold most of it in packages and barrels?

A. Sold it very little in packages; most of it in bottles.

Q. I mean the beer, before the Volstead Act?

A. Oh. We sold nearly all of it in barrels; ninety per cent of it probably in barrels.

Q. About ninety per cent of it in barrels?

A. Yes, sir.

Q. In bulk?

A. In bulk.

Q. Now, then, after the Volstead Act went into effect, up there in the Butternut Street plant, you went to making this near beer?

A. Yes, sir.

Q. Now, do you know anything about a man drinking beer, as to what quantities he would drink in comparison with the quantity of this soft stuff?

A. Why, a man could drink——

Mr. BURDEN (interrupting). You answer that question "Yes" or "No"; I suppose, you know or you don't.

The WITNESS. I do not know generally.

By Mr. WELCH:

Q. You drank beer yourself, I suppose?

132 A. Well, I can tell you a funny story about that, if you want to take it off the record, and it is a true one.

Q. Well, what is it?

The REFEREE. Off the record.

(Discussion outside the record which the stenographer was directed not to take.)

By Mr. WELCH:

Q. Now, Mr. Biehler, in regard to this soft drink that you made, how was that sold and to whom was it generally sold?

A. You mean this cereal beverage and these soft drinks?

Q. I mean this cereal beverage and these soft drinks that you made after the Volstead Act went into effect?

A. Why, it was sold in the bottle mostly, and sold—we tried to advertise it and we did everything to force the sale of it, without any success. The competition at the time was awfully sharp. All these large breweries had started making it, and the capacity was about ten times as great as their output, and everybody was out to get the business, and every means known was tried and used to sell it. But we could not sell it, and places used to buy it and it wouldn't sell——

Mr. BURDEN (interrupting). I object and move to strike it out.

The REFEREE. It may go out.

Mr. WELCH. An exception.

By Mr. WELCH:

Q. To whom did you sell, grocery stores, drug stores, hotels, or saloons?

133 A. To stores and drug stores and to private homes, and very little in the saloons. There were speak-easies and such things as that around, but we didn't sell much to them.

Q. In other words, there was not much trade with the saloons?

A. There was no trade left.

Q. And where you had the powers of attorney, or where you had control over the places, what about that?

A. That was wiped out entirely.

Q. And could you use the name "Congress Beer" after the Volstead Act went into effect?

A. We used the name "Congo"——

Mr. BURDEN (interrupting). I object to that.

Mr. WELCH. I don't know as I wish that, because that is all a matter of record that they could not do it.

The REFEREE. Question withdrawn.

By Mr. WELCH:

Q. You were informed, were you, Mr. Biehler, that under the law, after the Volstead Act went into effect, that you could not use the words or name "Congress Beer"?

A. Yes, sir.

Q. And were you informed about that time that you could not thereafter use the name "Derby Cream Ale"?

A. Yes, sir.

Q. Did you cease using those two names?

A. Yes, sir.

Q. Now, in regard to the quantities that a man would drink of beer and these soft drinks, I assume that a man in an evening, or for an hour or two, would drink several glasses of lager beer,
134 didn't he, or ale?

A. Yes; he would drink sometimes fifteen or twenty or more after supper; a lot of men would do that.

Q. Now, what experience have you had with this soft stuff in reference to the quantity that a man will drink—this stuff containing less than one-half of one per cent of alcohol by volume?

A. Usually they drink a glass, and when they come to the second glass I think they must fill up, because they don't drink any more.

Q. In other words, fill up the same as on water?

A. Just about like water.

Q. Now, your concern continued in business after the Volstead Act went into effect and until it went into voluntary dissolution?

A. Yes, sir.

Q. And the Haberle Beverage and Products Company continued to make soft drinks?

A. Yes, sir.

Q. And the Haberle Beverage and Products Company took over the plaintiff's plant on Butternut Street?

A. Yes, sir.

Q. And they continued in the soft-drink business?

A. Yes, sir.

Q. Now, taking the year 1921, did the Beverage Company make or lost money?

Mr. BURDEN. I object to that as calling for a conclusion and no proper foundation laid for the question, and incompetent and irrelevant and immaterial.

The REFEREE. That is not within the period, Mr. Welch.

135 Mr. WELCH. Well, they reject our claim on the ground that they could not allow our claim on the ground that they continued in a similar business. Now, if that was a losing game; if this concern which took over this brewery lost money——

The REFEREE (interrupting). I do not see how that is any proof whether or not they continued in a similar business, the fact they lost money. I will sustain the objection to that.

Mr. WELCH (after discussion). Well, I will withdraw that, so far as the new corporation is concerned, Mr. Burden.

By Mr. WELCH:

Q. Now, your concern here, the plaintiff here, after the Volstead Act went into effect in 1919, you continued to run your plant up there in making these soft drinks?

A. Yes, sir.

Q. Now, from the time when the Volstead Act went into effect until the time you went into voluntary liquidation on December thirty-first, 1920, state whether or not you made or lost money during that time.

Mr. BURDEN. We will take the same general objection and the further objection, which Mr. Toomey will state.

Mr. TOOMEY. And also the further objection that the matter of obsolescence is a matter of degree. It is a question whether
136 some—this was obliterated. It is not a question of profits.

Mr. WELCH. Well, if it is objected to, I don't know as I am as sure of my grounds, and I don't know if it is material or not, the evidence whether they made or lost money.

The REFEREE. Not of that, but it might possibly be some evidence of value.

Mr. TOOMEY. And, of course, the value relates to March first, 1913, and not to this period.

The REFEREE. Objection sustained.

Mr. WELCH. An exception.

By Mr. WELCH:

Q. Well, Mr. Biehler, you had certain outside properties, and when you bought those properties did the liquor-tax certificates or rights go with them?

A. They usually did.

Q. Well, you acquired all of them, did you?

A. Yes, sir.

Mr. WELCH. Now, your honor, I would like to reserve my right to ask this question over again. In other words, that may be competent, and I don't know but what it is—in other words, concerning the good will of a business, if you are making money you have got a good will, and if you are losing money you have not got a good will.

The REFEREE. I will hear you on that the next time, Mr. Welch.

137 By Mr. WELCH:

Q. Now, these outside properties; you have already stated that you sold your products to and through them exclusively; now, when you bought those properties, did you take into consideration the rights to sell beer there in purchasing the property?

Mr. BURDEN. Same general objection, and the additional objection that it calls for a conclusion.

The REFEREE. I think that is true. That is speculative, is it not, as to what he took into consideration in paying a certain price for the property? I think the only evidence that would be competent on that is the actual price.

Mr. WELCH. An exception.

By Mr. WELCH:

Q. Well, take, for instance, the property now known as the Burns property, what did you pay for that property?

A. We purchased that in 1914 for twenty-one thousand——

Mr. BURDEN (interrupting). Will you wait just a minute, while I am conferring. Now, will you state what the purpose of this is?

Mr. WELCH. To show this, substantially, and it is quite important, one of the things that is quite important here, that when they purchased this property, for instance, in 1914 they paid twenty-
138 one thousand. Outside of the liquor traffic attached to it, it was not worth eleven thousand dollars.

Mr. BURDEN. If that is the purpose, I desire to object to it. I think at that time we should interpose a general objection for the record on this particular feature of the case, which will reserve the record and set forth the Government's position in the form of an objection which was set forth this morning in the opening statement, and that is that the Government objects to any evidence in this case which goes to the question of depreciation on outside real estate, on the ground that the court has no jurisdiction to grant any relief on that account, and on the specific ground and for the reason that the matter was not presented to the department as contemplated by section 3226 of the Revised Statutes.

Mr. WELCH. Well, the good will was attached to those outside properties. That good will would be the difference between the actual value and what they paid for it. It would be the license, or the right attached to it, which was destroyed by prohibition.

Mr. BURDEN. If the purpose of this testimony goes to the good-will feature, our general objection applies. To the extent that it goes to the question of fixing value for depreciation purposes, the objection I just now announced is to stand.

139 The REFEREE. I will overrule the objection for the time being.

Mr. BURDEN. And an exception.

By Mr. WELCH:

Q. Go on, Mr. Biehler.

A. On March ninth, 1914, we purchased the Burns property for $21,221.77. That was the actual cost of that property. And on September 20th, 1921, we sold it for $8,000.00, and took a loss there of $13,221.77.

Mr. BURDEN. And we move to strike out the answer as a conclusion and upon the grounds stated in the objection.

The REFEREE. Motion granted. I do not believe the selling price is any evidence of value. Your experts can testify to what it is worth.

Mr. WELCH. An exception.

By Mr. WELCH:

Q. Mr. Biehler, without the liquor tax certificates attached to it, or without the right to sell liquor in it, intoxicating liquor, in order to purchase it, do you know what it was worth?

Mr. BURDEN. I object to this as calling for a conclusion and incompetent and improper, and——

Mr. WELCH (interrupting). Wait a minute. I will qualify him.

By Mr. WELCH:

Q. Have you seen real estate bought and sold, and were you familiar with the prices paid by your company for this prop-
140 erty and other similar properties, and what other breweries in Syracuse paid for property since, say, 1913, March first, 1913, and before?

A. Yes, sir.

Q. And down to the present time?

A. Yes, sir.

Q. And do you know what others paid for property similarly situated and located?

A. I do.

Q. And without license and with license?

A. Yes, sir.

Q. Now, are you able to tell what this property was worth when you purchased it—when did you say you purchased it?

A. In March, 1914, I think it was.

Q. Are you able to tell what this property was worth when you purchased it in March, 1914, with the liquor tax certificate and rights attached to it?

Mr. BURDEN. I assume he is going to answer "yes" or "no" instead of giving figures.

The REFEREE. Yes; answer "yes" or "no."

The WITNESS. What is the question?

By Mr. WELCH:

Q. Do you know what it was worth in March, when the company purchased it, with the liquor tax certificate attached and the rights?

A. Yes, sir.

Q. Now, what was it?

Mr. BURDEN. That we object to.

The REFEREE. Do you object upon the ground the witness is not qualified?

141 Mr. BURDEN. Not necessarily. We object to it upon the grounds of the same general objection that has been taken to all this testimony, and upon the further ground that it is immaterial and irrelevant and can not be claimed in this action under section 3226 of the Revised Statutes.

The REFEREE. I will make the same ruling as I have heretofore, with an exception to you, and I will receive the evidence, subject to any motion which you desire to make later in the case.

Mr. TOOMEY. I think, at this time, also, for the purposes of the record, we should object and move to strike out any and all references to license agreements or anything of that character, on the ground that that is a phase of the case that is being urged in court for the first time, and it was never presented to the department in connection with any of the negotiations, or in connection with any of their returns, or in connection with any claims for obsolescence and good will.

The REFEREE. I will make the same ruling and reserve your rights. I want to hear you on that proposition later.

Mr. BURDEN. And an exception.

By Mr. WELCH:

Q. What was it?

A. It was worth substantially about what we paid for it, $21,221.77.

Mr. BURDEN. I object to the answer as not responsive and move to strike it out.

142 Mr. WELCH. I concede that it go out.

By Mr. WELCH:

Q. What was it worth?

A. Twenty-one thousand dollars.

Q. Now, what was it worth without the license?

A. About fifteen.

Q. Now, have you got that schedule there of those outside properties?

A. Yes, sir.

Mr. BURDEN. Now, we move to strike out the evidence given on the value of this Burns property upon the grounds stated in the objection.

The REFEREE. Motion denied.

Mr. BURDEN. An exception.

By Mr. WELCH:

Q. Now, have you got Schedule B there, Mr. Biehler, referred to in the complaint, of all the outside properties?

A. I have got a schedule, but I don't know whether it is Schedule B or not.

(Discussion outside the record, which the stenographer was directed not to take.)

Q. There are several pieces of property, Mr. Biehler, shown in Schedule A, attached to the complaint; did your company own those pieces of property?

A. Yes, sir.

Q. Now, have you got, Mr. Biehler, what each piece cost, or have you had that made up, and what they were worth, the same as the Burns property?

A. Yes.

143 In other words, could you tell what they were worth when you purchased them and what they were worth when prohibition went into effect; can you tell without looking further into it?

A. This shows the market value, or their cost when we bought them.

Q. Do you know what they were worth without the licenses; do those figures show?

A. No.

Q. You will probably have to have that scheduled?

A. Yes, sir.

Mr. WELCH. I can shorten this by getting this schedule out to-night or to-morrow morning, and so I will pass that up for the time being.

Have you got the notices that we served with the payment of this money to the collector?

Mr. TOOMEY. I don't know whether we have or not. Have you copies of them?

Mr. WELCH. I have only copies.

(Discussion outside the record which the stenographer was directed not to take.)

Mr. WELCH. If the court please, I wish to introduce this notice of the Haberle Crystal Springs Brewing Company to show they paid under protest, and so forth.

Mr. TOOMEY. We will stipulate whatever the collector's records show.

Mr. WELCH. All right.

Now, if the court please, we wish to offer in evidence the notice of the Treasury Department on the rejection of our claim.

144 The REFEREE. Better have it marked.

Mr. WELCH. This is a copy and I was going to read it in while they compared it.

The REFEREE. There is no claim that this is not the notice of rejection, is there?

Mr. TOOMEY. I don't think so.

Mr. WELCH. I will read it in evidence and then he can watch his copy. It is stipulated, then, that this is the notice of rejection that is being read by counsel?

Mr. TOOMEY. Yes, sir.

Mr. WELCH (reading):

Plaintiff's Exhibit 7

TREASURY DEPARTMENT,
Washington, June 23, 1922.

Office of Commissioner of Internal Revenue:
IT:CA:M-3.
JWN-3.

HABERLE-CRYSTAL SPRINGS BREWING COMPANY,
500 Butternut Street, Syracuse, New York.

SIRS: Your claim for refund of $569.82 and abatement of $17,283.30, corporation income and profits taxes for the years 1918 and 1919, respectively, on account of obsolescence of good will, have been examined.

Your return for 1921 shows that the corporation is engaged in the manufacture of nonintoxicating beverages. In this con-
145 nection your attention is invited to office decision 472, found in Bulletin 17-20-884, paragraph 3, which reads in part as follows:

"No allowance for obsolescence will be granted in any case wherein connection with the operation of the business the good will will be valuable in another business, after the termination of the business in which the taxpayer is engaged."

Your attention is further invited to office decision 818, found in Bulletin 8-21-1465, which reads in part as follows:

"In the case of dealers who continue in a similar trade or business of such intangibles is not definitely limited, although the profits may

have been reduced. Therefore, liquor dealers who continue in a similar trade or business can not obtain a deduction under section 214 (8), on account of obsolescence of their good will, trade-marks, and trade branches."

It is held, therefore, that the good will of your business is still valuable in connection with your present business. You claims are therefore rejected. The rejection of your claims will ap-
146 pear officially in the next schedule to be approved by the commissioner.

Respectfully,

E. H. BATSON,
Deputy Commissioner.
By F. R. CLUTE,
Head of Division.

I offer it in evidence, and it is received, is it not?

The REFEREE. It is received, there being no objection.

(Notice of rejection received in evidence and marked "Plaintiff's Exhibit No. 7," of this date.)

Mr. WELCH. Well, now, if the court please, we have the 1918 claim here, but it is so small we will pass it up.

Mr. BURDEN. What is this?

Mr. WELCH. There is one claim here for $569.82, and that is so small we won't bother with it.

The REFEREE. All right.

By Mr. WELCH:

Q. Now, Mr. Biehler, back in 1918, I wish you would go on and tell us in your own way just what was done and what conclusions were arrived at in regard to discontinuing the National plant—that is, the plant on Burnet Avenue?

Mr. BURDEN. Well, of course, we object to that as calling for
147 a conclusion, in addition to the general objection heretofore taken, and incompetent and improper.

The REFEREE. I will let him testify as to what was done and what he knows was done.

Mr. BURDEN. And give the defendant an exception.

The REFEREE. Yes.

By Mr. WELCH:

Q. Well, go on, in regard to discontinuing this plant, and what was finally done with it?

Mr. BURDEN. And the same objection now.

The REFEREE. Objection overruled, and an exception to the defendant.

Mr. BURDEN. Yes.

By Mr. WELCH:

Q. I wish you would go on and tell us just what was done, what actions were taken in regard to the discontinuance of the National plant?

Mr. BURDEN. Same objection.

The REFEREE. You do not object to this upon the ground that it is not the best evidence?

(Discussion outside the record which the stenographer was directed not to take.)

The REFEREE. Your objection, as I understand it, is the same general objection as you have been making?

Mr. BURDEN. Yes.

The REFEREE. Objection overruled.

Mr. BURDEN. And an exception.

148 By Mr. WELCH:

Q. Go ahead, Mr. Biehler, and make your answer.

A. Early in 1918 we were operating both plants; that is, the Haberle plant on Butternut Street and the National plant in Burnet Avenue. It became obvious to all the directors of the company that, for economy sake, we would have to close down one plant; we didn't have output enough to maintain both, and so we started working out a plan as early as March, in 1918, to do something with the National plant, and we first thought of converting it into a cold storage, and we had people in the town interested in the particular project, and went up there and made an examination of the properties and appraised its value.

Q. Who appraised it?

A. Why, John S. Gray, for one, and Mr. McChesney, E. A. McChesney, and Charles Chapman, of the Chappell Dyer Company, I think.

Q. That was in 1918?

A. Yes, sir. They went up there with me.

Q. You were satisfied at that time that prohibition would go into effect?

A. All the directors had become satisfied we would have to close down the plant promptly, that they had no more use for it.

Q. On account of prohibition?

A. Yes; as well as our operation of it.

Q. Did you put it into the hands of real-estate agents?

A. Yes, sir; we put it into the hands of different real-estate agents.

149 Q. Who?

A. Well, we put it into the hands of Louis Wirth, for one, and made efforts among ourselves to get in touch with various plants

throughout the country which might be interested, and had a half dozen people up there looking it over.

Q. Did you get out circulars and mail them out to different concerns throughout the country?

A. Yes, sir; mailed out circulars and had conferences in the plant, and went up there and appraised it, and we had a——

Q. (Interrupting.) When was that appraised; can you give us the dates on that?

A. That was appraised about, along in September of 1918.

Q. And what was it appraised at?

Mr. BURDEN. I object to that as incompetent and improper.

The REFEREE. Objection sustained.

Mr. WELCH. An exception.

By Mr. WELCH:

Q. All right. Go on?

A. Do you mean that I can state the amount it was appraised at?

Q. No. They object to that. We will have to get the appraisers.

A. Well, they went up there and appraised it, any way, and came back and reported it, and we made every effort that anybody could make to sell that plant in 1918 and could not sell it, and we had the Associated Laundries up there——

Mr. BURDEN (interrupting). I object to that, made every effort to sell it and couldn't sell it, and I move to strike it out.

150 The REFEREE. That may go out.

By Mr. WELCH:

Q. You can not state conclusions. Just state what was done and what you did, and who did you see and who did you talk with?

A. Well, we talked with the representatives of the Associated Laundries.

Q. And did they look it over?

A. Yes, sir.

Q. In view of what, to turn it into a laundry?

A. We took them there for the purpose of their purchasing it for the purposes of a laundry; yes, sir. They examined the plant and made a price on it, made an offer. They did not purchase it. I took several other people up there and through there, and took the Tobin Company from Rochester up there, who afterwards purchased a plant in Rochester, and showed them all through there. Now, that is all back in 1918. We made arrangements up there to move the machinery and had taken some away to our plant and converted our whole delivery plant from the National to the Haberle, men and horses and wagons and automobiles and such things. We

had nothing going on at the plant, no brewing going on at that time at the National plant, except later in 1918 we brewed a little, but it amounted to very little. No charges were going out from the National plant, just kind of a shipping place and delivery or shipping station, I should say. Everything was first taken to the Haberle Brewery and sold from there, and everything was be-
151 ing done to close down that plant eventually, getting ready for it in every way. We advertised the sale of the houses around it and did eventually sell them. We did nothing for the upkeep there hardly for a year or two; let the roofs go down and everything else; didn't think the property was hardly worth putting any money in it. We had an offer from the milk association up there which did not go through. Various things were brought back to our directors and prices placed on them, on account of the condition of the plant, abandoning it as a brewery, and so forth, and the fact it had been a brewery put the price down so low that the offers made were all rejected.

Q. What price did you have on it?

A. Well, we finally got down to one hundred thousand dollars on it, and couldn't get that.

Q. That was in 1918?

A. That was in 1918. We had a professional cold-storage engineer up there, Mr. Jarvis, who came up there along in October and worked through that plant, off and on, for three months; submitted his report to Ed. Rice, who was contemplating buying it, and the cost of conversion was so great they turned down the proposition, and Mr. Rice had offered fifty thousand dollars for it and we turned that down. We paid Jarvis for his work along in January or February—I think the receipt was dated—of 1919 for the work he had done there. Our vehicles were all removed to the other plant but one, and our drivers were all removed, excepting those we discharged.

152 Mr. BURDEN. Are you through with that?

Mr. WELCH. Yes.

Mr. BURDEN. To protect the record, I desire to move to strike out the answers of the witness relating to the plant and to the attempted sale of this plant, and so forth, on the grounds stated in the objections last taken and heretofore taken.

The REFEREE. Isn't this evidence on the value of the good will?

Mr. BURDEN. We do not concede it.

Mr. TOOMEY. Value of good will relates to March first, 1913.

Mr. WELCH. Well, this is loss of value since that time.

The REFEREE. What is that date, March first, 1913?

Mr. BURDEN. You have to go back to March first, 1913.

Mr. TOOMEY. They had this plant prior to March first, 1913, and any good will or assets must be valued as of that date, for the purpose of comparison.

The REFEREE. Off the record.

(Discussion outside the record, which the stenographer was directed not to take.)

I will deny the motion at this time.

Mr. BURDEN. An exception.

The WITNESS. Our board of directors, by motion and by resolution——

153 By Mr. WELCH:

Q. Have you that resolution?

A. There are some here; yes.

Q. You have the resolutions there?

A. Yes.

Q. Well, refer to those resolutions, because they are taken from the books and they are correct?

A. On July 11th, 1918, the following resolution was introduced by Director Joy and unanimously carried——

Mr. BURDEN (interrupting). Let us have a preliminary objection to that resolution going in upon the ground that it is entirely incompetent and irrelevant as to the time in question and involved in the pleadings and in the answer.

Mr. WELCH. I might say to your honor that there is a ruling of the department that if they intended to go out of business in 1918 they are entitled to their loss on the property.

The REFEREE. From that time on?

Mr. WELCH. Well, from what it was on March first, 1913, and what it would be when they went out. In other words, the idea is this——

The REFEREE (interrupting). Off the record.

(Discussion outside the record, which the stenographer was directed not to take.)

The REFEREE. Objection overruled. I will receive the evi-
154 dence. It is received so far as it is material on the question of value when the plant actually did discontinue.

Mr. WELCH. We will show that.

Mr. TOOMEY. I think at this time the court would not object to my making a brief statement on that proposition. I think there is a misconception in the court's mind.

The REFEREE. I will be very glad to have you make a statement at this time.

Mr. TOOMEY. The section which controls in this case, section 234 A (8) of the revenue act of 1918, uses this language—well, first, before

that, there is a provision that a taxpayer shall be taxed only on his net income, and his net income is his gross income less the deductions which the statute authorizes. Now, there are numerous deductions which may be allowed from the gross income to arrive at the taxable net income.

In this case we are concerned with just one of those deductions. That deduction reads as follows: That a reasonable allowance may be allowed for the exhaustion, wear and tear of property, including a reasonable allowance for obsolescences.

Now, when we speak of depreciation here, we are speaking of it merely as a short phrase to express the meaning of "exhaustion, wear and tear of property."

Now, as to the theory of the depreciation allowance. First
155 of all, the reason that we use a March first value is merely because prior to that time Congress at any time had authority to tax incomes. Congress, in its wisdom, has permitted, in taxing income, a return of the capital of the taxpayer. In other words, now, on the question of depreciation, they took the March first depreciation of assets owned prior to March first; they took the value as of March first, determined its expectancy, struck a percentage and they spread that over the number of years of expectancy of that property, so that, at the end of that period, if the taxpayer took a certain percentage each year, by the end of the life of that property he gets back his capital invested. Now, that is the theory of depreciation. In that case there is no comparison between the March first value and any other value. It is the normal exhaustion and using up of a capital asset which had a certain value on March first.

That is very clear, I think. I don't think there is any dispute about that. I want you to get that cleared up so you will get the Government's theory.

Now, we come to obsolescence. Congress, in its wisdom, provided a reasonable allowance for obsolescence. Why? Because it recognized that in certain cases the taxpayer could not get back a return of his capital by the normal process of depreciation. There
156 are certain cases where by the normal process of the art, we will say a machine becomes supplanted by a better machine and it has to be discarded altogether. Depreciation would not give him his return on that, because through some combination of circumstances the thing has begun to be discarded prior to the normal expectancy of the thing.

Now, then, we come down to this case, in regard to the point of the obsolescence of good will. Obsolescence of good will, if it is permitted at all, is permitted because of the fact that prohibition wiped out something which was of value to a taxpayer on March first, 1913.

If the court is under the impression here that there must be a comparison between the March first value and the value of the thing at the time it went out, that is incorrect. If they are entitled to a comparison on account of obsolescence, they would be entitled to go back and to prove the capital value which they had at March first, which was taken away from them subsequently by a strange combination of circumstances. The only question of value, as to this good will, is the value it had on March first, 1913. If we find that it did have a value on March first, if they had a good will on March first, if it is capable of being valued as of March first, 1913,
157 then the inquiry, and the only inquiry, as to the other end of the horn is whether it was obliterated or whether it became obsolescent. That is the theory of obsolescence.

The REFEREE. Yes; that is true; but isn't this evidence material upon the question as to whether it did become obliterated by prohibition?

Mr. TOOMEY. Yes; that is the point, exactly, but not for the purpose of comparing the value of March first, 1913. I thought that was in your honor's mind.

The REFEREE. Yes; I understand you.

Mr. WELCH. Of course, we do not concede the counsel's statement as to depreciation, or what he is trying to make it out to be. We claim we had something valuable here on March first, 1913; prohibition comes along and wipes it out or kills it, or kills it in part at least.

Mr. TOOMEY. The question is, How much was wiped out?

Mr. WELCH. The question is, suppose it was partly wiped out, then it would become another question.

Mr. TOOMEY. That becomes a question of law, what is the theory of obsolescence as used in the revenue act?

The REFEREE. That is the question. Now, how is that material?

Mr. WELCH. What, your honor?

The REFEREE. This resolution.

158 Mr. WELCH. There is a holding of the Treasury Department that if this company intended to go out of business in 1918, that then they are entitled to their obsolescence of good will, and so on, under their own holdings in other cases. There is no question about that, is there, Mr. Toomey?

Mr. TOOMEY. Well, there are so many of those, I can not tell offhand.

The REFEREE. Is it material what the officers themselves did?

Mr. WELCH. That would be the only evidence we could offer. In other words, the very heart of this decision is this: If they intended to go out of business, and they can only show what they intended by what they did. We wish to show that in 1918, the beginning of 1918, they intended to go out of business on account of prohibition

in this plant on Burnet Avenue, and the evidence here already is that they never made any of these soft drinks over there and never did anything. They abandoned it and went out; and they had two units, one on Butternut Street and one down on the other street. Now, one unit is destroyed, and so they intended to go out of business, and that is what this evidence is for, to show that very thing.

The REFEREE. Why isn't it material on that?

159 Mr. TOOMEY. I do not believe they can segregate the different units or plants the company had.

Mr. WELCH. We can not do anything until we have the evidence.

The REFEREE. I will receive it for the time being. Same ruling.

Mr. BURDEN. An exception.

By Mr. WELCH:

Q. Go on, Mr. Biehler, and state what you did with reference to discontinuing or going out of business in your National plant?

A. You want me to read that resolution?

Q. Yes.

Mr. WELCH. You don't object to it on the ground that it is not the best evidence?

Mr. BURDEN. Well, of course, we entered about all the objections that are necessary to protect the defendant, we think.

Mr. WELCH. Well, you don't object that it is not the best evidence? You have got them and they were taken from our books and sworn to.

Mr. BURDEN. We are prepared to meet you here upon the depreciation and the obsolescence, on the proposition as you outlined in your reports and as our appraisers have been over this property.

Mr. TOOMEY. Will you let us have an opportunity to examine your books?

Mr. WELCH. Yes; we will give you any opportunity you want to examine the books.

160 Mr. TOOMEY. That is all right.

The REFEREE. Then you are not objecting upon the ground that it is not the best evidence?

Mr. BURDEN. No.

The REFEREE. Simply objecting to [illegible]as a general objection?

Mr. BURDEN. Yes.

The REFEREE. Objection overruled. It will be received.

Mr. BURDEN. And the Government has an exception.

The REFEREE. Yes.

The WITNESS (reading). "Resolved, That the management be authorized to handle the matter of discontinuing brewings at the National plant and to begin operations at the Haberle plant in any manner that they see fit for the best interests of the company, and that they investigate and report on the cold storage and ice business

at an early date"; and then, "that the progress of gradually transferring the business of the National plant was begun immediately was reported in the subsequent meeting of August eighth"—wait a minute. That was one resolution and I am going into another resolution.

By Mr. WELCH:

Q. All right. Go on to the next one, whatever you have got there?

A. And then, on September 12th, 1918, the following resolu-
161 tion was offered, seconded and unanimously carried: "Owing to the war the Government has issued orders, regulations, restrictions, and so forth, seriously effecting the brewing industry, and it is therefore deemed advisable that this company convert as many of its assets into cash as possible, particularly disposing of real estate properties and accepting compromise settlements on accounts receivable, and so forth, therefore, be it resolved, that the officers of our company are hereby empowered to negotiate such sales and effect such settlements in accordance with their judgment for the best interests of the stockholders."

Well, I haven't got those minutes here. It refers to the National plant here, and this is a statement that should go to the Government, and so on.

(Book produced and handed to the witness.)

Q. What have you there now?

A. These are the minutes of the regular meetings of the Haberle-Crystal Springs Brewing Company.

"July 11th, 1918. Among other things: The coal situation was discussed at length, also the advisability of brewing lager and ale in the Haberle plant and discontinuing brewings at the National plant, and either use the property for other purposes or dispose of it, whereupon Director Joy moved.

That the management be authorized to handle this matter in any manner that they see fit for the best interests of the company;
162 also that they investigate and report on the cold storage and ice business at an early date."

And this motion was seconded and unanimously carried.

Q. What date was that resolution?

A. July 11th, 1918.

Q. Proceed.

A. On September 12th, 1918, "Owing to the war the Government had issued orders, regulations, restrictions, and so forth, seriously affecting the brewing industry, and it is therefore deemed advisable that this company convert as many of its assets into cash as possible, particularly disposing of real estate properties and accepting com-

promise settlements on accounts receivable, and so forth, therefore, be it resolved that the officers of our company are hereby empowered to negotiate such sales and effect such settlements in accordance with their judgment for the best interest of the stockholders."

On December 12th, 1918: "Resolved, That this company, by its president, for the purpose of determining the advisability of purchasing about 25 per cent of its capital stock, mail to each of its stockholders a letter with a reply attached thereto, to be signed by the stockholder, of which the following is a copy:

SYRACUSE, N. Y., *December 14, 1918.*

DEAR SIR: It is proposed that the Haberle-Crystal Springs Brewing Company purchase about twenty-five per cent of its
163 capital stock at par ($100.00 a share), giving each stockholder as shall appear as such on the books of the company at the time the company shall declare its intention to so purchase same the privilege of selling twenty-five per cent of their holdings (excluding fractional parts of shares) at this price, the same to be paid for by said company out of its accrued surplus and to be held by the company as treasury stock, and if resold by the company all stockholders as shall appear of record on the company's books at the time the company shall, by resolution of its board of directors, declare its intention to sell same, shall have the first privilege of purchasing same in proportion to the amount of their holdings in the company.

Said treasury stock while so held by said company shall have no voting power and shall not participate in any dividends.

If you are in favor of this proposition as above stated, please sign the consent below and return to the company on or before January first, 1919, so that if the company purchases your stock the transaction can be closed on or about March first, 1919, you keeping one of the enclosed for your files.

Yours very truly,

THE HABERLE-CRYSTAL SPRINGS BREWING COMPANY,
By CHARLES SCHWARZ, *President.*

164 Please do not detach.

HABERLE-CRYSTAL SPRINGS BREWING COMPANY,
Syracuse, New York.

DEAR SIRS: I consent to the foregoing proposition and under the terms therein stated I agree to sell to you, the Haberle-Crystal Springs Brewing Company, shares of my stock in your company for $, the same being twenty-five per cent of my holdings (excluding fractional parts of shares) and I agree to deliver said

stock to said company for purchase and transfer, upon demand, at any time prior to March first, 1919.

Witness my hand and seal this day of December, 1918.

(Blank for signature) [L. S.]

(Blank for signature) Witness.

Q. And what is the date of that, Mr. Biehler, where that action is had?

A. That is December 14th, 1918.

Q. And did all the stockholders turn in twenty-five per cent of their stock?

A. One hundred per cent of them turned it in.

Q. Now, what is next? Are there any others there? Yes; there was twenty-five per cent went in later; was there not?

A. On March first. I have that here. On March first, twenty-five per cent of the stock was called in and paid for at par out of the treasury of the company. That was on March first, 1919, and
165 on October first, 1919, a like amount of the outstanding stock was called in at par; and on March first, 1920, we paid a twenty-five per cent dividend out of the surplus of the company, which had no relation to the calling of the stock; and on October first, 1920, our first distribution was made by the company, after the company went into liquidation. In 1921 a second distribution of twenty-five per cent was made; and on December first, 1921, the final distribution of fifty per cent on the outstanding stock was made.

Mr. BURDEN. Is that all about the transfer to the Haberle-Crystal Brewing Company that you care to put on the record?

Mr. WELCH. Well, I want to put in the record this fact.

By Mr. WELCH:

Q. This plant, the National plant, was finally sold to the Haberle Securities Company, was it?

A. Yes, sir.

Q. Do you know what its value was on the 29th of October, 1919, this plant?

Mr. BURDEN. Same general objection, and the special objection that it is immaterial, as a matter of dates, and irrelevant.

The REFEREE. How is that material?

Mr. WELCH. Well, we want to show by somebody, your honor, what it was worth when prohibition came along and took it out. We showed what it cost, or what it was worth in 1913, and we
166 have got to show what it was worth when prohibition came in, and that is necessary to get the difference between them.

The REFEREE. The only question, I suppose, is what was the obsolescence of good will caused by prohibition.

Mr. WELCH. Well, that is the difference between what they were worth in 1913 and what they were worth in 1919, of course; that goes to make up the obsolescence.

The REFEREE. The question is whether any difference such as that is caused by prohibition.

Mr. BURDEN. Of course, we take the position that that can not be shown on the case, until and unless they have established the principle that their constitutional right have been violated by the passage of the Volstead Act, that they are not entitled to compensation for the difference between the cost, and so on. They entered into the enterprise, after March first, 1913, subject to all the hazards of a business which by legislation was declared unlawful, and they went along from 1913, at least, until 1918. Don't you see that is the legal question involved?

The REFEREE. That is to be decided later on the briefs.

Mr. BURDEN. Yes.

Mr. WELCH. I might call your honor's attention to this fact, that a further claim which the corporation is entitled now to set up
167 comes within the purview of A. R. M. 20–11, viz. "Where the manufacture of near beer was commenced in the latter part of 1919 and 1920, obsolescence of tangible assets not used in such manufacture may be allowed in 1918 and 1919 if the taxpayer can definitely prove that it knew in 1918, the beginning of the period of obsolescence, that it would discard the particular assets on which obsolescence is claimed."

Now, that is from the department.

The REFEREE. Well, does the difference in value prove what the obsolescence of good will was caused by prohibition?

Mr. WELCH. Well, it would be worth so much in 1913 and continued to be of the same value or more, as it appears by the books of the company, until such value was shot by the coming of prohibition, and that is the obsolescence of good will.

The REFEREE. Do you have to show it was caused by prohibition?

Mr. WELCH. Yes, sir; we have got to show it, and I think we have shown that very definitely already. He said that they quit and that they got rid of the National plant, and it is self-evident already, on account of prohibition, and also all the resolutions show that.

The REFEREE. Well, I will receive it temporarily, subject to being stricken out on motion.

168 Mr. BURDEN. And give the defendant an exception.

The REFEREE. Yes.

By Mr. WELCH:

Q. Do you know what it was worth on the 29th of October, 1919, the National plant, Mr. Biehler?

A. Yes; I think I do.

Q. What, in your opinion, was it worth?

A. About fifty thousand dollars.

Q. Now, what would it have been worth if it was not for prohibition?

A. A half a million.

Mr. BURDEN. Just a minute. I object to that as calling for a conclusion and incompetent and improper, and I move to strike out the answer.

The REFEREE. Well, now, I guess I will have to sustain the objection. I think I am going as far as I can; and the answer is stricken out.

Mr. WELCH. An exception.

By Mr. WELCH:

Q. And did you discontinue, and did the company intend to discontinue, the use and operation of this National plant on account of prohibition?

A. Yes, sir.

Q. And no other cause?

A. And no other cause.

Mr. WELCH. I can't think of anything else to show right now. I don't like to be shut out. I would like to have the right to ask further questions.

169 The REFEREE. You have that right.

Mr. WELCH. I don't want to be held to a strict rule, and I don't want to hold the others to it.

Mr. BURDEN. Now, we want to move to strike out all the testimony as to the different values just given by Mr. Biehler in the last few questions on that subject, upon the grounds stated in the objections.

The REFEREE. I did not let him state the difference in value, did I?

Mr. BURDEN. Well, he gets it the other way 'round.

The REFEREE. Motion denied.

Mr. BURDEN. And an exception for the Government.

Mr. WELCH. I think you can cross-examine.

Mr. BURDEN. If the court please, I think you are familiar with the request, for the convenience of counsel, that we adjourn to Wednesday morning.

The REFEREE. Yes. We will now adjourn until Wednesday morning, this place, at ten o'clock.

(Reference adjourned to Wednesday morning, same place, July 1st, 1925, at ten o'clock.)

170 Morning session, Syracuse, New York, Wednesday, July 1, 1925, 10:00 a. m.

Presiding: Honorable James J. Barrett, referee.

Appearances: Same as before.

FRANK C. BIEHLER resumed the stand as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

(Taxpayer's receipt, marked "Plaintiff's Exhibit No. 8," of this date, for identification.)

By Mr. WELCH:

Q. Mr. Biehler, I show you plaintiff's Exhibit number 8, for identification, and I ask you, was that received by the plaintiff at the time it paid the money represented by that receipt?

A. Yes, sir.

Mr. WELCH. I offer the paper in evidence.

Mr. BURDEN. No objection.

The REFEREE. Received.

(Taxpayer's receipt received in evidence and marked "Plaintiff's Exhibit No. 8," of this date.)

Plaintiff's Exhibit 8

Mr. WELCH. This paper being short, I will read it into the record. At the top it says: "Paid under protest." Then it reads as follows:

171 Treasury Department, United States Internal Revenue

Form 1107—Taxpayer's receipt for income and excess profits tax

Notice to taxpayer: Before presenting payment to cashier enter on this form:

(a) Name.
(b) Address.
(c) Form number of return.
(d) Amount of tax paid.

Office Collector Internal Revenue

[Check]

Form No. of return Feb. 55. Tax, $18,493.13.

Name, Haberle Crystal Spring Brew Co.

Address, 500 Butternut, Syracuse, N. Y.

(Written on face of exhibit in ink: "Paid under protest"; "Paid under protest."

Stamp: "Collector of Internal Revenue. Paid Jul. 6, 1922—Cashier D, Syracuse, N. Y.")

Mr. WELCH. I ask to have this paper marked for identification.

(Paper marked "Plaintiff's Exhibit No. 9," of this date, for identification.)

Mr. WELCH. I now offer in evidence the notice that we served on the collector, Mr. Clarke, at the time this money was paid.

172 That is a copy of it, signed by Mr. Biehler, as treasurer. Mr. Clarke has the original. I have seen that before myself.

I offer in evidence plaintiff's Exhibit 9, for identification, being a notice served on the collector at the time the money therein represented was paid to him.

The REFEREE. Received in evidence.

(Notice of protest received in evidence and marked "Plaintiff's Exhibit No. 9," of this date.)

Mr. WELCH. This being short, I will also read it into the record.

Plaintiff's Exhibit 9

SYRACUSE, NEW YORK, *July 6, 1922.*

Collector Internal Revenue, Syracuse, New York:

We herewith hand you our check for $18,943.13, representing an assessment of additional tax against the Haberle Crystal Springs Brewing Company for the fiscal year ending May 31, 1919.

You will please take notice that this payment is made under protest and solely for the purpose of preventing the collector from seizing and selling our property to satisfy this assessment.

Respectfully,

THE HABERLE CRYSTAL SPRING BREWING COMPANY,
By FRANK C. BIEHLER, *Treasurer.*

173 By Mr. WELCH:

Q. Now, Mr. Biehler, you located yesterday where you made the beer, and that was the old Haberle Brewing plant on Butternut Street?

A. Yes.

Q. Now, where you made ale, where was that?

A. That was at 1000 Burnet Avenue.

Q. And about how far is that from the center of the city?

A. About a mile and a half.

Q. How far is it from the brewery known as the Haberle plant, where you made lager beer?

A. About two miles.

Q. Those two breweries were in no way connected by any pipe lines or anything of that kind, were they?

A. In no way.

Q. At no time?

A. In no way.

Q. Now, in your business, where you made beer, that was the old Haberle Brewery?

A. Yes, sir.

Q. And where you made your ale, that was the old Crystal Spring Brewery, or the National?

A. Yes, sir.

Q. Called the National?

A. Yes, sir.

Q. Now, did you keep a separate set of books for each plant?

A. We kept a distinct set of books for each plant, with controlling entries for each company, so we could determine at the end of each year the net profits of each plant, and then we merged them at the end of each year.

Q. And then merged them into the books at the end of the year?

A. Yes, sir.

174 Q. So that the immediate bookkeeping for your ale plant, the National plant, was done down at the National plant on Burnet Avenue?

A. Yes, sir.

Q. And for the lager beer, of course, those books were kept up at the brewery on Butternut Street?

A. Yes, sir.

Q. The old brewery?

A. Yes, sir.

Q. You say they were separate books and at the end of the year, then they were merged into one?

A. Yes, sir.

Q. But each kept separate during the year?

A. Yes, sir.

Q. And did that continue from the time you started in there until the time you dissolved?

A. It did.

Q. And you said, I believe, that you made about as much ale as lager beer, it averaged about the same, did it?

A. Yes; just about the same.

Q. And the profits were about the same on each one?

A. Very little difference, if any.

Q. Now, when your company was organized, you stated that it had a capital stock of $800,000.00?

A. Yes, sir.

Q. Was that stock all issued at par upon its organization?

A. Yes, sir.

Mr. BURDEN. As I understand, we are to have the general objection that we took at the last hearing?

The REFEREE. Yes.

175 Mr. BURDEN. The same objection to this line of testimony.

The REFEREE. That is true. Objection overruled.

Mr. BURDEN. And an exception in each instance, as your honor has ruled.

The REFEREE. Yes, sir.

By Mr. WELCH:

Q. And I think you have testified that you stopped making any beer after the Volstead Act went into effect on October 29th, 1919?

A. Yes, sir.

Q. And did the Haberle plant ever sell any beer after that?

A. No, sir; neither at the National or the Haberle.

Q. You never sold beer of more than one-half of one per cent?

A. No, sir.

Q. Now, Mr. Biehler, what per cent was the beer and ale that you made prior to prohibition and under the war-time prohibition acts?

A. Well, up to a certain point, it was right around four per cent, and after the President's proclamation it was 2.75.

Q. I mean prior to the proclamation.

A. About four per cent.

Q. From the time you started in business until these war-time prohibition acts and so forth started in?

A. Yes, sir.

Q. Now, Mr. Biehler, a question on this soft-drink business. You have already testified in regard to the ale, that you made no
176 half of one per cent ale after October 29th; that is, you made no more ale after the Volstead Act went into effect?

A. No, sir.

Q. Now, then, I wish you would tell us a little more about it—

A. (Interrupting.) At the National plant, we never made any more ale.

Q. Now, I wish you would tell us about this soft-drink business; some of it had one-half of one per cent and some of it didn't have any; is that right?

A. Why, we made soda waters and different things like orange cheer, lemon lime, ginger ale, birch beer, and all those brands which had absolutely nothing to do with the manufacture of beer or near-beer. We purchased new facilities for the manufacture of it and put it in another place in the plant.

Q. You did not use your vats or storage tanks?

A. Absolutely nothing. We had to build about everything new that was used in the manufacture of those soft drinks, and it had no relation to any manufacturing of beer or near-beer, or anything else.

Q. And that you started in with after the Volstead Act went into effect?

A. Yes, sir.

Q. Now, your trade, you described that somewhat, but where did you sell these soft drinks and this one-half of one per cent stuff?

A. Well, we sold the most of it to the stands along the roads, and grocery stores and drug stores, and well, that is about the
177 substance of where we sold it. I don't know whether we sold much of it anywhere else, there was so little of it sold.

Q. Was much of it sold, to amount to anything, to your former customers?

A. No; very little.

Q. In other words, it was a new line of trade you had?

A. Mostly.

Q. A new line of customers?

A. Yes, sir.

Q. Now, Mr. Biehler, was it drank by a different class of people, generally?

A. Why, I should say so. All soft drinks, of course, are drank by a different class of people.

Q. Now, have you got a schedule there of where you called in the stock; have you got the dates there and the amounts you called in; take the first twenty-five per cent, will you give me the date of it? I do not believe you have given me the date. I wish you would go right down through what you have got there, giving the per cent and the date you called in the stock.

A. Well, on March 1st, 1919, we called in twenty-five per cent of our outstanding stock at par.

Q. In other words, each stockholder turned in twenty-five per cent of his stock?

A. Turned in twenty-five per cent of his stock and got par for it.

Q. Now, your next one?

The REFEREE. What did they get for it?

The WITNESS. Par, at its face value.

By Mr. WELCH:

Q. And just let me ask you: The par value of each share of stock was that?

A. $100.00.

178 Q. And that $800,000.00 was divided into shares?

A. Yes, sir.

Q. Of $100.00 each?

A. Yes, sir.

Q. I see. Now, take your next one.

A. On October 1st we called in twenty-five per cent of the remaining outstanding stock at par.

The REFEREE. Do you mean they got twenty-five dollars for it?

The WITNESS. No. Twenty-five per cent.

The REFEREE. You mean twenty-five per cent of all the stock?

The WITNESS. Yes, sir.

By Mr. WELCH:

Q. And what is the last date you gave?

A. October 1st, 1919.

Q. And you called in twenty-five per cent of the then outstanding stock?

A. Yes, sir.

Q. And paid the stockholders?

A. Yes, sir.

Q. And did the stockholders turn it in?

A. One hundred per cent.

Q. And they got one hundred cents on the dollar for what they turned in?

A. Yes, sir.

Q. Now, when is the next distribution of the stock?

A. On March 1st—wait a minute. On June 4th, 1919, we paid a dividend out of the surplus of six per cent on the then outstanding stock.

Q. Now, take your next one.

A. And on December 15th, 1919, we paid another dividend of eight per cent out of the surplus on the then outstanding stock.

Now, on March 6th, 1920, we paid a twenty-five per cent
179 dividend out of the surplus on the then outstanding stock, and on June 15th we paid a dividend of four per cent from the surplus on the stock then outstanding. On October, 1920, we made our first distribution in liquidation of twenty-five per cent on all the stock then outstanding.

Mr. TOOMEY. What was the last one?

The WITNESS. On October 1st, 1920, we made a distribution of twenty-five per cent on the stock then outstanding. That was in liquidation, and on June 1st, 1921, we made another distribution of twenty-five per cent in liquidation, on the stock then outstanding. And on December 21st, 1921, we made our last distribution of fifty per cent on the stock then outstanding.

By Mr. WELCH:

Q. How much was distributed to the stockholders?

A. $1,004,659.00 in cash. That amounted to $125.58, I think, I haven't got that figured out here, but that is what it figures out, somewheres around there, on the original stock. There was a correction to be made in some figures I gave here yesterday.

Q. Yes. You gave some figures the last day you were in court that you desired to correct?

A. Yes. There is just a little discrepancy there. The stenographer in copying these figures copied them wrong. I gave our net profits for 1911 as $130,174.58. Now, that should have been $130,831.39.

180 Q. Now, you started calling in your stock in anticipation of liquidation, did you not?

A. Yes, sir; and before that.

Q. What is your first call there?

A. Well, we made our first payment on March 1st, 1919, but we had been talking about it for a year before.

Q. Well, that is when you made your call of stock?

A. Yes, sir.

Q. On March 1st, 1919?

A. Yes, sir.

Q. In anticipation of liquidation?

A. Yes, sir.

Q. And in anticipation of going out of business?

A. Yes, sir.

Q. Now, back in the early part of 1918, tell us, was it talked over at that time after these different stages, after the passage of the eighteenth amendment, and the different States voting on the amendment and ratifying it, was it generally discussed among the directors and management of the company, from January, 1918, the going out of business?

Mr. BURDEN. Now, we desire to make the additional objection that there is no proper foundation laid for the question, and as improper and incompetent, and not in proper form.

The REFEREE. That is true. Objection sustained.

Mr. BURDEN. And the objection is further made that the minutes of the corporation, of course, are the best evidence.

181 Mr. WELCH. I will withdraw it for the time being.

By Mr. WELCH:

Q. When you made your last distribution that you have given us here, you had disposed of, or the plaintiff had disposed of, its real estate and mortgages and such as that, its principal assets, had it not?

A. Yes, sir.

Q. Are you able to give us the amount of business done, Mr. Biehler, from November 1st, 1919, to May 31st, 1920?

A. The amount of business done was $259,139.22.

Q. And what was the amount from June 1st, 1920, to January 1st, 1921? Have you got that?

A. No; I don't seem to have those dates.

Q. I see. In other words, your report would run for the next year?

A. Just what are those dates you asked me?

Q. From June 1st, 1920, to January 1st, 1921?

A. Now, what is it you want?

Q. The gross sales, if you have them; have you got them?

A. Our sales, that is, our net sales—you mean the sales of the company and the amount of money they received, that is, the sales less the regular discounts, or the gross?

Q. The gross, if you have got it?

A. $235,622.65.

Q. Now, from November 1st, 1919, to May 31st, 1920, did you operate at a loss or a profit?

Mr. TOOMEY. That is objected to as immaterial and not an issue in the case.

182 The REFEREE. This is offered on the question of the obsolescence of good will and intangible assets?

Mr. WELCH. Yes; and similar business.

The REFEREE. I will receive it.

Mr. TOOMEY. An exception.

By Mr. WELCH:

Q. Now, did you operate at a loss or a profit from November 1st, 1919, to May 31st, 1920?

A. We operated at a loss.

Q. How much of a loss?

A. $82,565.70.

Mr. BURDEN. Same objection and motion to strike it out, with reference to the last question and answer.

The REFEREE. Well, how does it have any bearing on the question as to whether or not you were engaged in a similar business?

Mr. WELCH. Whether the business was profitable or not. I think it would have a bearing on that question in that way.

The REFEREE. Well, that would not prove that you were not engaged in a similar business, the fact that is was not profitably operated.

Mr. WELCH. Well, if we continued in business and we suffered a loss——

The REFEREE (interrupting). The question is not whether you operated at a loss or profit. The question is whether you operated along similar lines. Isn't that the question? And if so, how

183 is the question whether you made money or lost money important on that proposition?

Mr. WELCH. Well, it would be important in this regard: Now, then, at this time they were not making any beer. They had no market and they were losing money. Now, they operated at a profit when they made the beer, the beer with the alcohol in, without any

restrictions. Now, if they operated at a loss, then you can not say that those two articles are similar, or similar in their nature, or similar in their trade, or anything of that kind. But, that is some evidence that I should think should be before the court as to whether they did operate and whether they operated at a loss or profit. That fact, it seems to me, is a fact that should be in here and has some bearing on what goes into this question.

The REFEREE. On that particular question, I think it is immaterial. It might be some evidence on the question of obsolescence of good will and intangible assets.

Mr. WELCH. I think it is on that, your honor.

The REFEREE. I think on that ground I will receive it, but so far as bearing upon the question of the similarity of the business, it is immaterial.

Mr. BURDEN. And give us an exception?

The REFEREE. Yes.

By Mr. WELCH:

Q. Have you stated?

A. Yes, sir.

184 Q. Did you operate at a loss or a profit?

Mr. BURDEN. Same general objection and immaterial added.

The REFEREE. Repeat the question.

Mr. WELCH. Did you operate at a loss or a profit from June 1st, 1920, to January 1st, 1921?

The REFEREE. Do you mean June 1st, 1919, or June 1st, 1920?

Mr. WELCH. From June 1st, 1920, to January 1st, 1921.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

By Mr. WELCH:

Q. What is your answer?

A. From June 1st, 1920, to January 1st, 1921, we operated at a loss.

Q. How much?

A. $72,592.89.

Mr. WELCH. I think that is all. I would like to have you defer cross-examination so that I may call Mr. Webb, who is anxious to get away.

Mr. BURDEN. Very well.

185 FRANK J. WEBB, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Webb, you live in Syracuse?

A. Yes, sir.

Q. And have for a great many years?

A. Yes, sir.

Q. Now, what is your business, or what has been your business here?

A. Well, I have been for a great many years in the business of selling stocks and loaning money on mortgage security.

Q. And you were in business here in 1913?

A. Yes, sir.

Q. And had been for some years prior to that?

A. Yes, sir.

Q. And you sold stocks and bonds and all those securities, and I suppose municipal securities?

A. Yes, sir.

Q. And you knew and you were familiar with—you represented banks loaning money here, did you?

A. Yes, sir.

Q. And you had, I assume, a certain line of customers that you bought stock and bonds for?

A. Yes.

Q. Here in Syracuse?

A. Yes; and about here.

Q. In and about Syracuse?

A. Yes, sir.

Q. Now, you were familiar, on March 1st, 1913, and about
186 that time, with what different stocks and bonds sold for and did you keep posted on them?

A. Yes, sir.

Q. And you had a knowledge of it at that time?

A. Yes, sir.

Q. And you have a knowledge of it now, what those securities sold for?

A. A general knowledge.

Q. And what, in your opinion, based upon sales made by you and sales made within your knowledge on or near March 1st, 1913, would have been the necessary return to an investor on a security backed entirely by real and tangible personal property in the city of Syracuse?

A. To individuals and estates, from five to six per cent; to savings banks and corporations of that sort, from four to five per cent.

Q. And you would consider that a reasonable return, would you?

A. Yes, sir.

Q. Now, is your opinion based upon transactions made by you or transactions within your knowledge during the year 1913, on which the investing public was well informed, in which the security and the yield were both given consideration?

A. Well, I would like to qualify my answer. I would not say entirely in the year 1913. I would like to say 1913 and previous years.

Q. 1913 and previous to that?

A. How is that?

Q. In 1913 and previous years?

A. Yes, sir.

Q. And I suppose that when the war started in, in 1914, there was a difference, up and down?

A. Yes, sir; it was altogether different.

187 Q. You would consider, then, that a rate from four to six per cent on investments would be a reasonable return?

A. Yes, sir.

Mr. WELCH. You may examine.

Cross-examination by Mr. TOOMEY:

Q. Your statement as to a return or from four to six per cent is with reference to all kinds of securities in general; is that so?

A. Why, in the case of savings banks, it would be on bonds such as they were allowed by law to buy, municipal bonds, State bonds, and all that sort. At that time they could take such bonds on a four per cent basis, and many thousands of them were held on that basis.

Q. And your statement here as to four to six per cent; is it limited to securities of that character?

A. What per cent?

Q. Four to six per cent.

A. For banks, as I say, banks and insurance companies. For individuals I should say from five to six per cent.

Q. And just what do you mean by individuals?

A. Well, I have in mind men who had money to invest.

Q. I see. That is all.

Mr. WELCH. That is all.

Now, Mr. Biehler, will you take the stand?

188 FRANK C. BIEHLER, resumed the stand as a witness on behalf of the plaintiff, testified as follows:

Cross-examination by Mr. TOOMEY:

Q. What is your business now, Mr. Biehler?

A. Why, I am the treasurer of the Central City Storage Company, and I am treasurer of the Haberle Securities Company, and I am treasurer of the Haberle Crystal Spring Brewing Company, treasurer acting under this.

Q. Do you have any connection with the Haberle Products Company?

A. No; except as a stockholder.

Q. You are a stockholder?

A. Yes, sir.

Q. And that corporation is still in existence, is it, and doing business?

A. Yes, sir.

Q. Where is it operating?

A. 500 Butternut Street.

Q. Same old plant?

A. Operating in the same old plant.

Q. And they are engaged in the business of manufacturing soft drinks?

A. Yes, sir.

Q. And have been since this reorganization took place?

A. Yes, sir.

Q. Ever received any dividends on your stock?

A. No, sir.

Q. The company is still operating at a loss?

A. It is operating at a loss; yes, sir.

Q. And a good many of the brewing companies throughout the country and in this locality are still engaged in the business of
189 manufacturing soft drinks; are they not?

A. Well, there are some.

Q. And a good many of the old saloons and places throughout Syracuse and surrounding country are still engaged in the business of selling soft drinks in the same houses, or places, aren't they?

A. Not the same ones.

Q. Well, some of them?

A. I will say there are some, but not the same ones.

Q. And just what were the soft drinks manufactured by this company after the reorganization?

A. What were they?

Q. Yes.

A. Well, I will have to refer to my minutes for them. Why, we made soda water, ginger ale, birch beer, orange cheer, lemon lime, root beer, and cereal beverage.

Q. What do you mean by cereal beverage; under what classification does near-beer come?

A. Cereal beverage.

Q. Cereal beverage?

A. Yes, sir.

Q. What were the names of those different beverages; what were the brands?

A. Well, we called ours "Congo."

Q. Did you ever use any of the names that were attached to your former products, such as "Congress," and so forth?

A. I don't believe that the Haberle Crystal Spring Brewery ever did.

Q. Did you use any of the names?

A. You mean during the operation of the Haberle Crystal Spring Brewing Company?

Q. Yes.

A. No; except "Congo."

190 Q. That was a name that had been used prior?

A. Yes, sir.

Q. What that used prior?

A. Yes; we had made that prior. We had made that prior to prohibition, "Congo."

Q. And what is the name of this plant now that is operating, what is the full name of that, this soft drink establishment?

A. Haberle Beverage and Products Company.

Q. Now, these different pieces of real estate that you had and termed as outside real estate, you sold all of those, didn't you?

A. Yes, sir.

Q. During what period of time were those saloons sold?

A. Well, that period from 1918 up until the liquidation of the company.

Q. Now, in connection with the sale of those properties, you negotiated separate contract with the purchasers of them; didn't you?

A. We did what?

Q. You negotiated certain contracts with the purchasers of those different properties, didn't you?

A. Yes, sir.

Q. And the purpose of that was to compel, or to bind the people that purchased these properties to purchase your soft drinks and beverages for a period of ten years, wasn't it?

A. Well, we did that in some cases, yes.

Q. You did it wherever you could?

A. With the expectancy that we would be allowed to make beer again, and no good for anything else.

Q. Some of the purchasers of your properties are still selling

191 your soft drink beverages under an exclusive arrangement to sell none other in these places?

A. Positively none that I know of anywhere.

Q. Well, all those contracts run for a period of 10 years?

A. It doesn't make a particle of difference, and we don't hold anybody to them, and we are not making any beer to-day.

Q. Didn't you make the contract for that purpose?

A. No; we made that contract in anticipation of our getting beer back.

Q. You said you relinquished them, you didn't hold them to the contract at all?

A. Not at all—not in a single case.

Q. Well, when did that take place; how long did they operate under these contracts?

A. It has not been operated at all; didn't operate under it at all at any time.

Q. How many of these contracts did you have?

A. I don't remember. I don't believe we had—do you mean on the sale of these properties?

Q. Yes.

A. I don't believe we had over a dozen in all; I couldn't tell you exactly.

Q. Do you remember having one with Francis Buechler?

A. Might have been on a piece of property we sold him; yes, sir.

Q. I hand you what purports to be a copy of one of these contracts, and I ask you if that is a sample of the contracts that you made with those people?

A. Well, that is something about like it; of course, I couldn't say positively, without comparing it.

192 Q. And in some instances it was incorporated right in the deed of conveyance?

A. Yes, sir.

Q. And those deeds are now on record?

A. Yes, sir. That place is out of business.

Mr. TOOMEY. I ask to have this marked for identification.

(Paper marked "Defendant's Exhibit 1," of this date, for identification.)

By Mr. TOOMEY:

Q. Have you the originals to these contracts in your possession?

A. No; I haven't any here.

Q. Has the company?

A. I think so.

Mr. TOOMEY. Do you object to our introducing this as a copy, or will you put us to the trouble of producing the original?

Mr. WELCH. I suppose they are all the same. I drew them all. I will tell you, when you come to your side of your case, we will produce anything you want. If you want these contracts I will give them to you, or let you put in a sample, if they are all alike.

Mr. TOOMEY. We would prefer to do that, with the understanding that we have the privilege of examining them at the time we come to put in our case.

Mr. WELCH. Surely.

Mr. TOOMEY. You will produce the original contracts at that time?

Mr. WELCH. Yes. We will give you anything we have got.

193 You want us to produce the contracts made with the plaintiff on the sale of outside real estate?

Mr. TOOMEY. Yes.

Mr. WELCH. We will produce whatever we have on them and you may further cross-examine the witness on them, and we will reserve a like right.

By Mr. TOOMEY:

Q. These contracts, some of them, were filed as of record, as I understand it, by the Haberle Crystal Spring Brewing Company?

A. They were what?

Q. They were filed among the proper records of the county?

A. I think so.

Q. Who were the directors of the Haberle Crystal Spring Brewing Company up to and at the time of its dissolution?

A. Why, John S. Gray, Thomas Hogan, Walter Welch.

Q. Is that the counsel for the plaintiff here?

A. Yes. George J. Gannon, Charles Schwarz, Frank C. Biehler, Edward Joy, Michael Zahn, and the others I do not recall offhand.

Q. Well, we will just pass that for the time being. In regard to this National plant, you eventually sold that for a hundred thousand dollars?

A. Yes, sir.

Q. Would you say that a plant which can be sold for a hundred thousand dollars is obsolete?

A. Well, that plant was sold for a hundred thousand dollars, after we put sixty thousand dollars of improvements in it,

194 and repairing it up, and so forth, and it practically sold for forty thousand dollars.

Q. Now, just what was done with the machinery which was in that plant?

A. We removed part of it to the Haberle Crystal Spring Brewing Company and sold the rest for junk.

Q. What did you do with that which was moved to the Haberle plant?

A. We sold it from there.

Q. You what?

A. We sold most of it from there.

Q. What part of it was used in the manufacture of soft drinks?

A. Nothing.

Q. Do you mean that no part of the machinery was used in the manufacture of soft drinks?

A. No, sir; no part of it was used in the manufacture of soft drinks.

Q. How about the machinery that was in the Haberle plant?

A. Very little of it used for anything but the manufacture of near-beer, and a very, very small proportion of that.

Q. How much did you get for the machinery that you sold out of the National plant?

A. Well, we sold fifteen carloads and got four thousand dollars for it. I can't tell you what was all in it. It all went up to Canada, about fifteen carloads, as I recall.

Q. Did you sell it to some brewing concern in Canada?

A. Sold it to a man named Herbert. As I understand, he has gone into the brewing business since.

195 Q. What did you get for the machinery that you sold out of the Haberle plant?

A. Well, we got at the rate of about ten to fifteen cents on the dollar for it.

Q. Could you tell in 1918 what machinery you were going to use in the manufacture of soft drinks and what you were going to sell?

A. Could we tell in 1918?

Q. Yes.

A. We could tell a lot that we were not going to use.

Q. Well, could you?

A. Yes; we could.

Q. Well, what?

A. We could tell we were not going to use the National plant. We knew that. We had five times the capacity in the Haberle plant that we would need, and we knew that.

Q. As a matter of fact, your sales were greater during the war time, in 1918, than they ever were before, the sales, the number of barrels, and so forth?

A. No, sir.

Q. Isn't that true of breweries generally?

A. No. It was in dollars and cents, but not in barrels. The price went up, and the revenue went up to six or seven dollars a barrel, which added to your selling price, you see. Sales began to decrease greatly in 1918.

Mr. TOOMEY. We want the privilege of cross-examining Mr. Biehler further after we have an opportunity of examining the minute books of the corporation, because that really involves about the only things that are in here.

196 The REFEREE. You may have that right.

Mr. WELCH. Yes, sir; and willingly.

The REFEREE. Is that all you want?
Mr. TOOMEY. Yes; at this time.
The REFEREE. Anything else, Mr. Welch?
Mr. WELCH. I think I better reserve until the defendant gets through.
The REFEREE. Very well. That is all, Mr. Biehler.
Mr. WELCH. I will call Mr. Siebeneichen.

CARL W. SIEBENEICHEN, called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Siebeneichen, where do you reside?
A. Rochester, New York.
Q. And what is your business?
A. Public accountant.
Q. How long have you been a public accountant?
A. Approximately five and a half years.
Q. What was your business prior to that?
A. Accounting, practical accounting, bookkeeping, and in a managerical capacity.
Q. Now, have you gone over the books of the plaintiff for the purpose of preparing a report for the trial in this action?
A. I have.
Q. And did you make such a report?
A. I did.

197 Mr. WELCH. I ask to have this marked for identification.

(Volume marked "Plaintiff's Exhibit No. 10," of this date, for identification.)

By Mr. WELCH:

Q. I show you Exhibit Number 10, for identification, and I ask you if that is one of your reports?
A. This is one of my reports, covering a balance sheet audit of the books of the Haberle Crystal Spring Brewing Company, covering a period from June 1st, 1907, to and including May 31st, 1919.
Q. Yes.
Mr. WELCH. Now, I stipulate that all the books of the company be considered in evidence, and we will produce any books that the defense wants upon the trial of this case, on their request, or they can go to the office and examine them and take extracts, or we will produce them on the suggestion or order of the court.

By Mr. WELCH:

Q. And this statement that you have made, which has been marked "Exhibit 10," for identification, you say you made that from the books of the company?
A. I did.
Q. And when did you make that; about when?

A. Sometime during the month of March and April, 1924.

Q. Now, I wish you would go on from that report and tell us what you found.

198 Mr. BURDEN. We do not desire to be unduly technical, but, if the court please, we object upon the ground that no proper foundation has been laid for this testimony; that it is incompetent and irrelevant and immaterial. If the Government knew the purpose and knew what was in the report that was regarded as anything relevant, we could go over it and see what can be done, but we don't know anything about it and at this time we are obliged to be technical, because we don't know the purpose of it.

The REFEREE. Why not give them an opportunity to go over this, and then they can make their objections intelligently.

Mr. TOOMEY. I might interrupt at this point to say that, as it stands, this is wholly incompetent and irrelevant and immaterial. The purpose of it is not shown. They should first show the purpose of it, and at this time I do not see where a general rehashing of what the books of the Haberle Spring Brewing Company show is material in this case, until they specify it, or point out what there is that is material and relevant.

The REFEREE. I think that is true.

Mr. WELCH. I think if you examine the report you will see the purpose of it. You do not object, of course, on the ground that we have not got the books? My stipulation is that all of the books may be considered in evidence and you may have the extracts.

199 The REFEREE. What is the purpose of this evidence, Mr. Welch?

Mr. WELCH. This really furnishes the evidence and basis upon which the action is based.

Mr. TOOMEY. Well, that is not definite.

Mr. WELCH. We want to show the profits for 1913 and for five years before that, and show the investment and the tangibles and intangibles.

The REFEREE. Is not that already in evidence?

Mr. WELCH. No. You do not object to this report on the ground that it is not the best evidence?

The REFEREE. I think you better withhold it until they examine this report and determine what they desire to do regarding it.

Mr. TOOMEY. The effect of his offer is to say that the books are entirely in evidence.

The REFEREE. Of course, there are a great many things in the books that would not be admissible at all.

Mr. WELCH. What I want to get in evidence is the result of his examination of those books and what they show.

Mr. BURDEN. I submit, so far as I understand the purpose of that, there is nothing that is material or relevant here, except what has been already claimed in the reports of the taxpayer and the demands of the taxpayer upon the Government.

200 Mr. WELCH. No, no.

The REFEREE. I will not rule on this man's evidence until I hear what the questions are.

Mr. WELCH. I was going to have him go through and explain it and then I was going to offer it in evidence.

Mr. BURDEN. Offer what in evidence?

Mr. WELCH. All the reports.

Mr. BURDEN. I assume Mr. Welch knows as well as I do about the custom and practice of putting the books in before the reports and then allowing the expert to say I made an audit and made a statement.

Mr. WELCH. Well, in other words, we agree to consider all the books or any parts of them you want in evidence, that they are in evidence.

Mr. BURDEN. We object to the books, except in so far as they bear upon the case.

Mr. WELCH. And we put the expert on the stand and he shows what those books show, and for the purpose of determining the amount we are entitled to recover here.

Mr. BURDEN. Well, it goes right to the point of our former objections here, that only what they have claimed be considered, and the books are immaterial and irrelevant to the case. They are merely a declaration in their own favor, and further that what the plaintiff has already claimed is all that can be material to the case,

201 if the court desired to verify it, what the plaintiff had already claimed.

The REFEREE. You do not object to the books, or to this report upon the ground that it is not the best evidence?

Mr. BURDEN. Well, we do at this time, upon the ground that no proper foundation has been laid. If the books were offered here we would have a chance to examine them and see.

The REFEREE. I will have to sustain the objection, if it is made on that ground.

(Discussion outside the record which the stenographer was directed not to take.)

The REFEREE. If there is nothing further we will now take an adjournment until two o'clock this afternoon.

Afternoon session, Syracuse, New York, Wednesday, July 1, 1925, 2.00 p. m.

Presiding: Honorable James J. Barrett, referee. Appearances: (Same as before).

Mr. BURDEN. With regard to the request of the counsel for the plaintiff that we stipulate in the form offered as to the national prohibition amendment and act and so on, we have had a conference and Mr. Toomey thinks that we should not so stipulate, but simply state that we agree with the understanding of the counsel and the
202 court, and the court may take judicial notice of all of the acts of Congress and of all the provisions of the constitutional amendment and of the statutes and decisions on the subject.

Mr. TOOMEY. As a general proposition, all these tax cases involve the question of bureau rulings and tax board decisions and regulations, and all that sort of thing, and we never hesitate to stipulate the court may take judicial notice of all those where they appear in the official publications of the Treasury Department and that they may be used by counsel on both sides and may be cited by the court orally and in written briefs for such weight as the court may see fit to attach to them on questions of law solely, and we are so willing to stipulate in this case.

Mr. BURDEN. As to the Congressional Record, why, we will have to look at the record ourselves if it is necessary to prove it.

The REFEREE. Does that include all of the things you are going to stipulate? How about this suggestion as to the vote on the national prohibition amendment?

Mr. TOOMEY. Well, we have no more independent knowledge of that than anybody else, and we would have to go to the Congressional Record.

The REFEREE. That is not stipulated?

Mr. TOOMEY. No.

203 The REFEREE. The referee can not take judicial notice of that, the vote on the amendment.

Mr. BURDEN. That is the trouble. You have got to send for the Congressional Record.

Mr. WELCH. I can do this: In regard to the vote of the different States and the votes on the eighteenth amendment and so on, all those different States here are taken from a case in the United States court. I will give you that citation.

Mr. BURDEN. Why don't you put that on the record, and then the court can read that case and it will eliminate all the trouble.

The REFEREE. Off the record.

(Discussion outside the record which the stenographer was directed not to take. Matter of the stipulation held until to-morrow morning.)

Mr. WELCH. What have you done as to the statements from the books?

Mr. TOOMEY. We are ready to make our proper objections to them. I take it you are offering them in evidence?

Mr. WELCH. No; but I expect to offer them in evidence.

Mr. TOOMEY. At the time they are offered in evidence we will make our objections, and, furthermore, have you enough copies so they can be furnished us?

204 Mr. WELCH. I don't know, but I will see that you have copies.

CARL W. SIEBENEICHEN resumed the stand as a witness on behalf of the plaintiff, testified as follows:

Direct examination (cont'd) by Mr. WELCH:

Q. Did you make an examination of the books and records of the plaintiff; and, if so, for what period did you cover?

A. From the period commencing June 1st, 1907, to May 31st, 1919, and from a period covering June 1st, in 1919, to May 31st, 1920; a further period covering June 1st, 1920, to what apparently were the final entries in the books of the Haberle Crystal Spring Brewing Company.

Q. Now, tell the court what you found as the book net profit of the plaintiff for each of the five fiscal years ending with the year ending May 31st, 1912.

Mr. BURDEN. We want to object, if the court please, upon the grounds of the general objection heretofore interposed.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

The WITNESS. For the fiscal year ending May 31st, 1908, the net earnings, as evidenced by the books——

The REFEREE (interrupting). You do not object to it upon the ground that it is not the best evidence?

205 Mr. TOOMEY. Not as to this, and our waiving that is with the understanding that the Government shall have an opportunity to check the books.

Mr. WELCH. Absolutely.

Mr. TOOMEY. And to make similar statements and to have the privilege of introducing any statement that we may make, or reports made, with that same privilege?

Mr. WELCH. Certainly.

Mr. TOOMEY. And not subject to the objection of not being the best evidence?

Mr. WELCH. So stipulated.

The REFEREE. It is so stipulated.

The WITNESS. For the fiscal year ending May 31st, 1908, the net earnings, as evidenced by the books, were $112,371.11.

For the fiscal year ending May 31st, 1909, the net earnings, as evidenced by the books, were $110,803.81.

For the fiscal year ending May 31st, 1910, the net earnings, as evidenced by the books, were $122,998.19.

For the fiscal year ending May 31st, 1911, the net earnings, as evidenced by the books, were $130,831.39.

For the fiscal year ending May 31st, 1912, the net earnings, as evidenced by the books, were $100,664.37.

206 Those are the five full accounting periods, commencing in the year 1918 and ending in the year 1912.

By Mr. WELCH:

Q. Will you give the net income, as shown by the books of the company, for the years ending May 31st—that is, from May 31st, 1913, to May 31st, 1920?

Mr. BURDEN. We have the same general objection and same ruling and exception as to these questions of this witness?

The REFEREE. Yes; same objection, same ruling, and exception.

The WITNESS. What is the question?

By Mr. WELCH:

Q. Will you give the net income, as shown by the books of the company, for the years ending May 31st, 1913, to May 31st, 1920, inclusive?

Mr. TOOMEY. Objected to upon the further ground as immaterial and not an issue in the case, for the issue here ends with the year or period March 31st, 1913.

The REFEREE. Objection overruled.

Mr. TOOMEY. An exception.

By Mr. WELCH:

Q. You may proceed.

A. For the fiscal year, ending May 31st, 1913, the net earnings were $145,623.02.

For the fiscal year ending May 31st, 1914, the net earnings were $235,692.03.

For the fiscal year ending May 31st, 1915, the net earnings were $147,647.24.

207 For the fiscal year ending May 31st, 1916, the net earnings were $127,587.53.

For the fiscal year ending May 31st, 1917, the net earnings were $125,351.24.

For the fiscal year ending May 31st, 1918, the net earnings were $134,365.20.

For the fiscal year ending May 31st, 1919, the net earnings were $125,135.65.

And, for the fiscal year ending May 31st, 1920, the net loss was $168,917.34.

Q. Did you separate the income found by you as reflected upon the books of the company for the year ended May 31st, 1920, to show the income or loss for the period prior to November 1st, 1919, and the period thereafter?

A. I did.

Mr. BURDEN. What is this, for the purpose of comparison?

Mr. WELCH. No; just the facts.

By Mr. WELCH:

Q. What did you find to be the income or loss for each of the two periods in question?

A. What is the question?

Q. What did you find to be the income or loss for each of the two periods in question?

A. From June 1st, 1919, to October 31st, 1919, there is a profit from operations in the amount of $106,869.72. From the period commencing November 1st, 1919, to and including May 31st, 1920, there is a loss from operations in the amount of $82,565.70.

208 Q. And have you any period thereafter on that?

A. Well, you asked the question from June 1st, 1919, to May 31st, 1920.

Q. Oh, yes. That is covered.

A. That answers that question.

Q. May I see that report you are just reading from?

A. Yes, sir [handing same to attorney].

Q. And is this paper, this paper I hold in my hand, which you were just reading from, this is a balance sheet and statement?

A. A what?

Q. It is a balance sheet and statement; is it?

A. It is a balance sheet and a profit and loss statement.

Q. As you have related here, taken from the books?

A. As I have testified, taken from the books of the Haberle Crystal Spring Brewing Company.

Mr. WELCH. I ask to have this marked for identification.

(Document marked "Plaintiff's Exhibit No. 11," of this date, for identification.)

Mr. WELCH. I offer Exhibit No. 11, for identification, in evidence.

Mr. BURDEN. To that we interpose the general objection heretofore interposed and the following additional.

Mr. TOOMEY. This applies to the year subsequent to the period in controversy in this suit, and it is wholly immaterial as to any

issues raised by the pleadings, for the reason more particularly that it is immaterial and not an issue in this case as to whether they
209 sustained a profit or loss for the year immediately following the period involved in this suit.

The REFEREE. Off the record.

(Discussion outside the record which the stenographer was directed not to take.)

The REFEREE. What do you say to the contention that it applies to the year after the year in question in your complaint?

Mr. WELCH. As to the year 1920?

The REFEREE. Yes.

Mr. WELCH. We have got to meet their contention as to going into another business, and good will, and so on, and show the defendant just what we did. It is to May 31st, 1920, and we went out of business in December, 1920, and the suit, your honor, is on the year 1919, for the return made that year.

The REFEREE. Yes; but how is it material to 1920?

Mr. WELCH. Well, I submit it would be material as to the good will, and to arrive at that; in other words, we think everything the company did in this case, up to the time that it wound up its business, it seems to me, at least, is competent and proper to have before the court.

The REFEREE. There is no objection upon the ground that it is not the best evidence?

Mr. TOOMEY. Not as to that.

210 Mr. BURDEN. We do not desire to be technical.

The REFEREE. The general objection, and also immaterial?

Mr. BURDEN. We object on the broad ground, as long as we have the books and can go over them.

Mr. WELCH. We will give you the books and copies of these reports or statements.

Mr. BURDEN. We contend it is immaterial.

The REFEREE. Off the record.

(Discussion outside the record which the stenographer was directed not to take.)

The REFEREE. I will receive it.

Mr. BURDEN. And give the Government an exception.

The REFEREE. Yes.

(Balance sheet, as at May 31, 1920, etc., received in evidence and marked "Plaintiff's Exhibit No. 11," of this date.)

By Mr. WELCH:

Q. Tell the court what you found to be the net investment of the company in real and personal tangible assets, in excess of liabilities, for the period, May 31st, 1907, to May 31st, 1911, inclusive.

A. What is the question? What is that period?

Q. I will repeat it. Tell the court what you found to be the net investment of the company in real and personal assets, in
211 excess of liabilities, for the period May 31st, 1907, to May 31st, 1911, inclusive.

Mr. BURDEN. Now, we object to that upon the grounds of the general objection stated heretofore, and upon the specific ground that no foundation has been laid for what is meant by "tangible assets" as used in this case by this witness and otherwise; and, therefore, it is without foundation and it is irrelevant.

Mr. WELCH. The evidence is that it appears on the books of the company and the books are correct.

Mr. BURDEN. I withdraw the specific objection and stand on the general objection.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

The REFEREE. Your general objection applies at all times to such questions as you may think it applies?

Mr. BURDEN. Yes.

The REFEREE. And the same ruling and exception.

Mr. BURDEN. Yes.

The WITNESS. To the fiscal year, ending May 31st, 1908, the net value of the tangible assets, as shown by the books of the company, was $1,461,492.47.

For the fiscal year ending May 31st, 1909, the net value was $1,523,706.08.

For the fiscal year ended May 31st, 1910, the net value was $1,552,324.44.

212 For the fiscal year ended May 31st, 1911, the net value was $1,619,155.83.

For the fiscal year ending May 31st, 1912, the net value was $1,653,608.05.

By Mr. WELCH:

Q. Have you got your report there?

A. The report covering that period?

Q. Yes.

A. Here it is [handing same to Mr. Welch].

Q. I show you Exhibit 10, for identification, and is that made by you from the books of the company?

A. Yes, sir.

Q. Now, what does that cover, that exhibit?

A. That covers an examination; in other words, a balance sheet audit of the books of the Haberle Crystal Springs Brewing Com-

pany, commencing June first, 1907, and ending May 31st, 1919, both dates inclusive; and it includes exhibits summarizing the profit and loss accounts for the years covered, and balance sheets and statements of income and profit and loss, the former showing the financial condition of the company at the close of each accounting period, and the latter the results of its operations for each fiscal year.

Q. As you have given them?

A. As evidenced by the books of the company.

Q. And those you have given, have you?

A. Yes; I have.

Mr. WELCH. Now, I offer that exhibit in evidence.

213 Mr. BURDEN. Same objection as to the last exhibit; same general objection to that.

The REFEREE. Same general objection, same ruling, objection overruled, and an exception to the Government.

Mr. BURDEN. Yes.

The REFEREE. Received.

(Balance sheet audit, etc., June 1, 1907, to May 31, 1919, received in evidence and marked "Plaintiff's Exhibit No. 10," of this date.)

By Mr. WELCH:

Q. Are you familiar with a memorandum decision of the committee on appeals and reviews of the treasury department, known and published in the bulletins of the treasury decisions as A. R. M. 34, which outlines a method for determining the value of the good will of a business by providing for the allowance of varying rates of return on investment in tangible assets and the capitalization of the average earnings over a reasonable period in excess of such return at a rate which would return to the investor his capital within what is assumed to be a reasonable period?

A. I am.

Q. Now, following the method outlined in the decision referred to and presuming it to be proper and necessary to provide for a six per cent return on investment in tangible assets of the plaintiff, averaged over a period of five years prior to March first, 1913, and capitalizing the excess of the average earnings of that company

214 for the same period at a rate necessary to return the investment in good will within a period of eight and a third years, what would be the amount of good-will valuation on March first, 1913, thus determined?

Mr. TOOMEY. Just a minute. May we have that question read again?

Mr. WELCH. Yes. Following the method outlined in the decision referred to and presuming it to be proper and necessary to provide for a six per cent return on investment in tangible assets of the

plaintiff, averaged over a period of five years prior to March first, 1913, and capitalizing the excess of the average earnings of that company for the same period at a rate necessary to return the investment in good will within a period of eight and one-third years, what would be the amount of good-will valuation on March first, 1913, thus determined?

Mr. BURDEN. Same general objection.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

The WITNESS. Based on a computation taking the average net earnings for the five full accounting periods immediately preceding March first, 1913, and the average investment in tangible assets, allowing a return of six per cent on the average tangible assets, and capitalizing the excess on an eight and one-third purchase, the good-will valuation would show $181,752.83.

215 By Mr. WELCH:

Q. Now, have you the figures as to what it would be on a five per cent return?

A. Using the same averaged earnings for the same period and the same average investment in tangibles for the same periods, allowing a return of five per cent on the average tangibles and capitalizing the excess average annual earnings on the basis of an eight and one-third years' purchase, or on a twelve per cent basis, the good-will valuation would be $311,924.25.

Q. Now, using the same figures of average investment in tangible assets and average earnings for the five years prior to 1913, and assuming a necessary return of six per cent on investment in tangible assets and the capitalization of the average earnings in excess of such return at a rate which would return the investment in a period of six and one-half years, what would be the amount of good will valuation thus arrived at?

A. Allowing a six per cent return on investment in tangible assets?

Q. For six and a half years?

A. Yes, sir. Allowing a six per cent return on the average tangibles and capitalizing the excess average annual earnings on the basis of a six and a half years' purchase, or an approximate return of 15.38 per cent as a basis for the capitalization, the good-will valuation would be $141,767.21.

Q. Well, using the same figures of average investment in
216 tangible assets and the average earnings for the five years prior to 1913, and assuming a necessary return of five per cent on investment in tangible assets and the capitalization of the average

earnings in excess of such return at a rate which would return the investment in a period of six and a half years, what would be the amount of good will valuation thus arrived at?

Mr. TOOMEY. Just a moment. On March first, 1913?

Mr. WELCH. Yes; all on March first, 1913?

The WITNESS. Using the same excess of annual average earnings and the same average investment in tangibles, allowing five per cent return on the average investment of tangibles and capitalizing the excess on a six and a half years' purchase basis, the good-will value would be $243,300.91.

By Mr. WELCH:

Q. Now, have you those computations there, made in writing?

A. I have.

Mr. WELCH. And will you give it to the stenographer and have him mark it, and we will give you copies of those.

The WITNESS. Just pardon me. There are some other computations that I have made included on this same sheet. I rather have you look at it before you introduce it.

Mr. WELCH. We will cross them off.

The REFEREE. Off the record.

217 (Discussion outside the record, which the stenographer was directed not to take.)

(Paper marked "Plaintiff's Exhibit No. 12," of this date, for for identification.)

By Mr. WELCH:

Q. Now, witness, I show you Exhibit 12, for identification, and is this the computation that you just gave in writing?

A. It is.

Q. And there was something here stricken off; now, that related to the different periods, did it; it was spread over certain periods?

A. That is a distribution of the value of the good will over a certain period or periods.

Mr. WELCH. I offer it in evidence.

Mr. BURDEN. Same general objection.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

The REFEREE. Received.

(Computation received in evidence and marked "Plaintiff's Exhibit 12," of this date.)

By Mr. WELCH:

Q. In your examination of the books and records of the plaintiff did you determine the book cost of the brewery located on Burnet

Avenue, known as the National plant, as of March first, 1913, and also as of May 31st, 1919?

A. Not in the examination made that is covered by this one report, but in a further examination made at some other time.

218 Mr. WELCH. I ask to have this marked for identification.

(Paper marked "Plaintiff's Exhibit No. 13," of this date, for identification.)

By Mr. WELCH:

Q. Now, please give the figures of valuation for the two periods mentioned as found by you from the books of the company.

A. In answering that question would you want me to state the synopsis of this report or just the figures?

Q. Oh, you may give the synopsis of it.

Mr. TOOMEY. First, the Government wants to know from the other side what the purpose of the record or the purpose of this line of testimony is?

The REFEREE. All right, Mr. Welch, what is the purpose of this?

Mr. WELCH. Why, the purpose of it, your honor, is that the evidence is so far that they discontinued the use of the National plant. Now, of course, that National plant had a certain amount of good will with it. Now, there is a claim here on the part of the Government that they rejected our claim on the ground that we continued in a similar business. Now, we had those two plants, the books were kept separately, and they manufactured a separate product, and we think we should separate them at this time. It is offered upon the question of obsolescence of good will and intangible assets.

219 The REFEREE. Is that an answer?

Mr. TOOMEY. Yes; I think so.

Mr. WELCH. And also the loss of trade, your honor, on the abandonment.

The REFEREE. Obsolescence of trade and trade name?

Mr. WELCH. Yes, sir.

Mr. BURDEN. I think we should put on the record the further objection that it already appears from the plaintiff's case that they were not complete obsolescences, and, therefore, it is immaterial and irrelevant and a contradiction of the previous testimony that they sold the plant and sold the machinery.

Mr. TOOMEY. Is it your purpose, by your report, to segregate any good will which might be attached to the National plant, from any good will which might be possessed by the corporation in general?

Mr. WELCH. Why, not unless the court sees fit to have it done.

Mr. TOOMEY. I am asking the witness.

Mr. WELCH. Is that a question for the record?

Mr. TOOMEY. Yes; absolutely.

The WITNESS. You asked whether or not the purpose of this report is to segregate any good will that may be attached to the National plant from the entire amount claimed?

Mr. TOOMEY. Yes.

Mr. WELCH. That is a conclusion for the court to determine, is it not?

220 Mr. TOOMEY. I understood you to state it as one of your purposes.

Mr. BARRETT (referee). No; he has a right to answer that, and if the witness cannot answer, he does not have to, of course.

The WITNESS. So far as the computations made here are concerned, there is no computation made for a segregation of good will attached to this plant. The only computation for good will that we have made is for both plants and no segregation, so far as the National plant is concerned.

Mr. TOOMEY. I think that answers the question.

Mr. TOOMEY. I can not possibly see any materiality in it, if the court please, because the other exhibits have gone into the question of the value of the good will of the entire business of the plaintiff. Now, I do not know why they are going into the question of some intangibles that might be attached to this National plant which has already been included in the broad general proof.

Mr. WELCH. I know, but the court has the right to segregate it, regardless of that, and it can take the facts and figures and figure it any way it has a mind to.

The REFEREE. It is only a duplication anyway. I will receive it upon the question of obolescences.

221 Mr. TOOMEY. On the question of obsolescence of intangible assets?

The REFEREE. Yes.

Mr. TOOMEY. And the same general objection and immaterial, and particularly as to the question of obsolescence.

The REFEREE. Objection overruled.

Mr. TOOMEY. And an exception to the Government.

The WITNESS. The examination covered by this report was an examination of the real estate account as carried on the books of the company, representing the land and building value of the National plant. The result of the examination shows that the value of the real estate account, which included land and buildings, as shown by the books on March first, 1913, was $340,731.88, and on October 28th, 1919, the value was $346,950.75. That represented the cost value as shown by the books.

REFEREE. You say, witness, that it was worth more in 1919 than it was in 1913?

The WITNESS. Quite true. There were additions made from time to time.

The value of the fixture and machinery account, as of March first, 1913, was $121,799.88, and on October 28th, 1919, the value was $96,966.48.

The vats and casks account, on March first, 1913, was $16,629.44, and on October 28th, 1919, $15,296.51.

222 It was found that the real estate account, land, and buildings provided for no depreciation. The fixtures and machinery account were found to be credited with depreciation each year. This is also true of the vats and casks account.

By Mr. WELCH:

Q. When you say the value, you mean the book value?

A. The book cost value. In other words, I found that the books reflected the cost, not only from the examination, but from conferences and discussions with the officers of the corporation.

Mr. WELCH. I think that is all. You may cross-examine.

Cross-examination by Mr. TOOMEY:

Q. While you were in the Government service as revenue agent, you had occasion to examine the books of this corporation, had you not, for prior years?

A. I did up to the fiscal years ending May 31st, 1917, and May 31st, 1918.

Q. Now, do the figures which you have given here, in so far as they involve those years when you made the examination, for which you made the examination, do they correspond?

A. Why, I could not say positively that they do, for the reason that from the standpoint of business accounting and the standpoint of Government accounting, there might be some adjustments.

Q. You have not checked your figures here with the figures contained in your prior reports?

223 A. I have no figures in the reports made at the time of the examination; consequently, I could not check them. But I will qualify that answer with this: That these figures are taken from the books that were used at that examination.

Mr. WELCH. I offer this Exhibit Number 13, for identification, in evidence.

Mr. TOOMEY. Same general objection and the special objection stated, that it does not segregate good will, and so forth, from the other, the Haberle Crystal Springs Brewing Company plant.

The REFEREE. Objection overruled. I will receive it for the reasons stated before, as evidence upon the question of obsolescence of intangible assets.

Mr. TOOMEY. An exception.

(Computation received in evidence and marked "Plaintiff's Exhibit No. 13," of this date.)

By Mr. TOOMEY:

Q. In this exhibit, numbered 11, showing the net loss of $168,917.34, for the fiscal year ending May 31st, 1920, you set up a reserve for loss of good will amounting to $162,799.75?

A. I do. That is on the books.

Q. And that figure enters into the net loss shown by this exhibit introduced in evidence here?

A. That enters into the net loss shown for the fiscal year ending May 31st, 1920.

Q. If you had not shown a reserve for loss of good will of
224 the amount indicated in this exhibit, the net loss shown for that year would have been the difference between $168,917.34 and $162,779.75?

A. Correct.

Q. Did you have anything to do with the preparation of this taxpayer's claim for refund?

A. The preparation of the claim for refund?

Q. Yes.

A. Yes, sir.

Q. That is, the claim for refund upon which this suit is based?

A. The claim for refund for nineteen thousand and some odd dollars?

Q. Yes.

A. Yes, sir.

Q. You computed the value of good will, which computation was made a part of that claim, did you not, a part of the claim for refund?

A. I did.

Q. And in that claim for refund, or in that computation you made an entirely different computation of good-will value; did you not?

A. Yes, sir.

Q. And in that first claim you based it, instead of upon the net worth of the corporation, you based it merely upon the capital stock outstanding of eight hundred thousand dollars?

A. That is the first one; yes, sir.

Q. And instead of using a six per cent rate, you used a twelve per cent rate?

A. I used a twelve per cent rate; yes, sir.

Q. And instead of arriving at a good-will value of the amount specified here, you arrived at a good-will value of $162,779.75?

A. That is true.

Q. Did you at that time regard a return of twelve per cent
225 a fair return upon the investment of this company in this brewery business?

A. I did not. I will qualify that answer by saying that that computation was made and made conservatively with the prospect of some adjustments to be made between the taxpayer and the Government at the final adjustment of the case.

Q. If you had used in your computations which have been introduced in evidence a twelve per cent return on the basis of the net worth, there would be no good-will value, would there?

A. I would not say that, unless I made a computation.

Q. And have you made computations on the basis of eight, ten, and twelve per cent, similar to the ones which have been introduced in evidence?

A. I have not.

Q. You have not?

A. No, sir.

Q. You followed the Government regulations in making your computation in everything, except the rate, did you not?

A. Rates; yes, sir.

Q. The Government rate allowed by A. R. M. 34 provides a rate of ten per cent for a business of this character; does it not?

A. Not necessarily for a business of this character, but generally speaking.

Q. Generally speaking?

A. Yes, sir; generally speaking.

Q. The total amount based upon your computation attached to this claim for refund, the total amount that the taxpayer claims for the fiscal year ending May 31st, 1919, was $15,530.92?

A. It was what? For the fiscal year ending May 31st, 1919, the amount claimed was or is $83,097.56.

226 Q. I mean your total tax refund for 1919, based upon your computation of the good will as set forth in your claim for refund, is $15,530.92?

A. $15,530.92; yes, sir.

Q. Now, from your examination of the books, isn't it a fact that the real estate and the bottling account and the vats, and so forth, were carried on the books at an inflated value, and due to the fact that no depreciation had been charged off in prior years?

A. That is true; it showed that no provision for depreciation had been made on the buildings.

Q. That resulted in inflated book values; did it not?

A. Not necessarily inflated book values.

Q. The tendency would be that, would it not?

A. Not necessarily.

Q. Wouldn't it, from the very nature of the fact that they had not charged off the normal wear and tear of these assets and being carried on the books at a rate which had been reduced by that depreciation, give them an inflated value?

A. Not necessarily, if the actual value was there. That is, if the value was not in excess of the fair value of the properties at the time.

Q. Well, you never valued these properties, so you do not know whether they were or were not?

A. No, sir.

Q. In the absence of an appraisal, or something to establish that, it would be, so far as your knowledge was concerned, an inflated value?

A. It would not show the residual value; no, sir.

227 Q. From the accounting standpoint?

A. From the accounting standpoint.

Mr. TOOMEY. That is all.

(Recess taken at 3.25 p. m. Case resumed at 3.40 p. m.)

The REFEREE. Proceed.

Redirect examination by Mr. WELCH:

Q. Just a question or two, witness. You spoke about depreciations on the real estate; now, of course, that might be overcome by repairs and replacements to the real estate?

A. That might be overcome——

Mr. BURDEN (interrupting). We object to that on the ground that it is a question for the court and a conclusion of the witness, and incompetent and irrelevant, and in addition to that the general objection.

The REFEREE. You do not object to it upon the ground that it is leading.

Mr. BURDEN. Well, it might be leading also.

The REFEREE. I think I will sustain it upon that ground, but I think otherwise I might accept it in view of the cross-examination.

Mr. WELCH. They put the question and that is why I asked it. They said something about repairs and replacements, as I recall.

By Mr. WELCH:

Q. State whether or not, witness, depreciation on the real

228 estate that you referred to might be overcome by reasonable repairs and replacements and by liberal charges?

Mr. BURDEN. That is objected to as calling for a conclusion and immaterial.

The REFEREE. I will receive it in view of the cross-examination.

Mr. BURDEN. An exception.

By Mr. WELCH:

Q. What do you say?

A. It would not be overcome by repairs, but it might be and could be overcome by additions or replacements being charged to expense, which ordinarily would be capital charges.

Mr. BURDEN. I move to strike it out as irresponsive to the question and conclusion of the witness and on the grounds stated.

Mr. WELCH. I submit that is competent, your honor, and I will follow that up.

The REFEREE. I think probably that part in which he says might happen—I think probably that is speculative and is the conclusion of the witness. I think I will grant the motion, and you may ask him what actually did happen, if he knows.

Mr. WELCH. An exception.

By Mr. WELCH:

Q. As to items or additions or replacements, do you know whether they are charged to expense or not?

A. I did not make a detailed examination into that, and it would only be disclosed by a detailed examination of the books.

229 Q. Now, you stated something about twelve per cent in your original return here; now, what per cent would that represent on the tangible assets?

A. Well, ten or twelve on the capital stock of eight hundred thousand would indicate a necessary return of $96,000.00, and a six per cent return on the net tangibles would indicate a necessary return of approximately $93,000.00. So that the difference in the two would be very slight as affecting the general result of the computation.

Q. And on this fifteen thousand, you took a two-year period there and spread it over two years?

A. What fifteen thousand are you referring to?

The REFEREE. That is the fifteen thousand put in the application for the refund; is it not?

Mr. WELCH. Never mind the question. It is in. Question withdrawn.

Do you want to cross-examine Mr. Biehler any further?

Mr. TOOMEY. Not right at this time, we do not.

Mr. WELCH. You were to look at the minute book?

The REFEREE. The right of cross-examination was reserved until the defendant was ready to resume.

(Discussion outside the record which the stenographer was directed not to take.)

Mr. TOOMEY. You have no objection to our asking him some questions later?

230 Mr. WELCH. No. I thought in as much as you had an opportunity to examine the minute book, you would want to proceed.

Mr. TOOMEY. No. We have done it very hurriedly, and we will have some further questions on cross-examination later.

Mr. WELCH. Then you don't want to go on until later?

Mr. TOOMEY. No.

The REFEREE. Yes; that right is reserved until the defendant is ready to resume.

Mr. WELCH. I will call Mr. Gannon.

GEORGE J. GANNON, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Gannon, you are connected with, or you were connected with the plaintiff, the Haberle Crystal Springs Brewing Company, for a good many years?

A. Yes, sir.

Q. And you had charge of the licenses?

A. Yes, sir.

Q. And powers of attorney over them?

A. Yes, sir.

Q. Taking the powers of attorney on the licenses?

A. Yes, sir.

Q. And those were taken from year to year, I assume?

A. Yes, sir.

231 Q. Now, have you got those licenses with you, and those powers of attorney with you?

A. Yes, sir [producing same].

Q. Now, on May 31st, 1913, how many powers of attorneys and assignments of licenses did the company have?

A. One hundred and thirty in the city.

Q. And have you produced them here in court?

A. I have.

Mr. BURDEN. It is understood that we have the same general objection as to this witness and an exception, without taking it on the record each time?

The REFEREE. Yes. Same objection, same ruling and exception.

Mr. WELCH. May we offer the whole 130, or just one?

Mr. TOOMEY. Are they all the same?

The WITNESS. Yes.

Mr. TOOMEY. I should think one would be enough, if they are all alike.

Mr. WELCH. I ask to have this paper marked for identification.

(Paper marked "Plaintiff's Exhibit No. 14," of this date, for identification.)

Mr. WELCH. Now, I have a statement here of May 31st, 1913, giving the name of the person and the location of the property. I offer that list in evidence as the list of the powers of attorney over the licenses, giving the name and the place of the licensed property.

Mr. TOOMEY. As of what date?

232 The WITNESS. May 31st, 1913. That would apply to March first also, because the licenses were issued later on and just the same.

Mr. BURDEN. And we have the same general objection.

The REFEREE. Same general objection; objection overruled, and an exception to the Government.

Received.

(Statement of "License certificates in effect May 31, 1913," received in evidence and marked "Plaintiff's Exhibit No. 14," of this date.)

Mr. TOOMEY. And, of course, we have the further objection to all these license properties, too, in so far as it is represented that they are introduced as evidence of obsolescence of intangible assets, that they are reflected in the computations which the prior witness has given, and, in the second place, in so far as they are introduced for the purpose of entitling the taxpayer to a deduction on account of loss of value in the properties to which these attached at the time of prohibition, then our objection is on the ground that there is nothing in the laws or regulations to permit any such deduction, and that, of course, goes to all of it, either for depreciation, obsolescence, or any other deduction.

The REFEREE. The question as to whether they are included in the other computations is for the special master to determine, and

233 the other is a question of law which is also for the special master to determine.

Objection overruled and I will receive it, as heretofore stated, upon the question of obsolescence of intangible assets.

Mr. TOOMEY. An exception.

The REFEREE. There is no objection to it upon the ground that it is not the best evidence?

Mr. TOOMEY. No.

The REFEREE. No objection upon the ground that it is not an accurate list of those licenses?

Mr. TOOMEY. I don't think so, with the reservation that if we want to examine these powers of attorney we can check them.

The REFEREE. Or question them.

Mr. TOOMEY. Yes.

The REFEREE. Otherwise, the only objections are as stated by counsel. The objection is overruled and the statement is received as Exhibit Number 14, and an exception to the Government.

Mr. TOOMEY. Yes.

By Mr. WELCH:

Q. And how many did you say there were, Mr. Gannon?

A. One hundred and thirty.

Mr. WELCH. Now, I offer in evidence these one hundred and thirty licenses as Exhibit Number 6. I offer the whole bunch as Exhibit 6, already marked.

234 Mr. BURDEN. Same objection as to Exhibit 14.

Mr. TOOMEY. They are all alike?

Mr. WELCH. Yes.

Mr. TOOMEY. Why can't you introduce one, and if you want the original back we can make a copy?

Mr. WELCH. Yes; we want a copy in the record of one of them, as there are one hundred and thirty of them. I offer Exhibit 6 in evidence.

Mr. BURDEN. And we have the same objection?

The REFEREE. Same objection as made to Exhibit Number 14. Objection overruled, received as Exhibit Number 6, and an exception to the Government.

I think you ought to state for the record what that is.

Mr. WELCH. It is a power of attorney and assignment from Miller and Debbold to the plaintiff of the liquor tax certificate Number 17153 of the series of 1912 and 1913, which is issued to the place Number 2002, North Salina Street, in the city of Syracuse, and dated April 4th, 1913, and filed with the commissioner of excise here in Syracuse, assigned with the commissioner, the deputy commissioner of excise in the city of Syracuse, or filed with them.

235 (Power of attorney, etc., received in evidence and marked "Plaintiff's Exhibit Number 6," of this date.)

By Mr. WELCH:

Q. Now, Mr. Gannon, were all those liquor tax certificates, or assignments and powers of attorney over those liquor tax certificates, by a copy or a duplicate of them, assigned and filed with the deputy excise commissioner here in the city of Syracuse for Onondaga County?

A. Yes, sir; there was.

Q. And there were a hundred and thirty in number, similar to Exhibit 6?

A. Yes, sir.

Mr. BURDEN. On what dates?

Mr. WELCH. On March 1st, 1913.

The WITNESS. Yes, sir.

Mr. WELCH. I offer these in evidence.

Mr. BURDEN. Same objection.

The REFEREE. This paper, marked "Exhibit 6," for identification, or in evidence; is that one named in the list submitted by you as Exhibit 14?

The WITNESS. Yes, sir.

The REFEREE. And are all of the other powers of attorney, one hundred and thirty in number, which you have mentioned and which are on that list, similar to this paper marked "Exhibit 6"?

The WITNESS. Yes, sir.

The REFEREE. With the exception of the name of the owner and the date and the place?

236 The WITNESS. And the license number.

The REFEREE. What is that?

The WITNESS. And the license number.

The REFEREE. And the license number?

The WITNESS. Yes, sir.

The REFEREE. And the place of business of the licensee, as you would call them?

The WITNESS. Yes, sir.

The REFEREE. Is that true?

The WITNESS. Yes, sir.

The REFEREE. The printed matters in all of these powers of attorney is the same?

The WITNESS. Yes, sir; I think so; they are supposed to be.

Mr. WELCH. And cover one hundred and thirty places?

The WITNESS. Yes, sir.

Mr. WELCH. As indicated in this notice or list?

The WITNESS. Yes, sir.

Mr. WELCH. And cover one hundred and thirty liquor tax certificates?

The WITNESS. Yes, sir.

The REFEREE. And you make the same objection as you made to Exhibit 14?

Mr. TOOMEY. Yes, sir.

The REFEREE. Objection overruled, Exhibit Number 6 received in evidence, and an exception to the defendant.

(One hundred and thirty liquor tax certificates, etc., received
237 in evidence as Exhibit Number 6, plaintiff's, of this date.)

Mr. WELCH. Now I will let you take one of these, being an assignment by Herman L. Austin to the plaintiff, dated the first day of September, 1912, covering the place 228 James Street, in the city of Syracuse, and covering the liquor tax certificate number 17095 of the series of 1912 and 1913.

Mr. BURDEN. To be returned to you at any time after the Government gets through with the witness?

Mr. WELCH. Yes.

By Mr. WELCH:

Q. And did you have that same number and all these certificates, Mr. Gannon, of the 1912 and 1913 series, on March 1st, 1913, that you have got here?

A. Yes.

Q. Now, those certificates were issued annually, were they not—the liquor tax certificates?

A. Yes, sir.

Q. And would you take a new power of attorney every year?

A. Yes, sir.

Q. And you so continued as long as the plaintiff was in business?

A. Yes, sir.

Mr. BURDEN. I want to object to that upon the ground that it is submitting to the witness the question of construcion, perhaps, of State statutes and otherwise as to legislation, and incompetent, irrelevant, and immaterial, in addition to the general objection.

238 (After discussion.)

Objection waived.

By Mr. WELCH:

Q. Now, have you another list there, Mr. Gannon, later on?

A. Yes, sir.

Q. What is your next list?

A. January 30th, 1918.

Q. January 30th, 1918?

A. Yes, sir.

Q. And have you got a list of the number that the plaintiff had at that time?

A. Yes, sir; one hundred and thirty-one.

Q. One hundred and thirty-one?

A. Yes, sir.

Q. And is this the list, Mr. Gannon, showing the number that you had on January 30th, 1918?

A. Yes, sir.

Q. And it gives the name of the person giving the assignment and power of attorney and the location of the property?

A. Yes, sir.

Mr. WELCH. I ask to have this list marked for identification.

(List marked "Plaintiff's Exhibit Number 15," of this date, for identification.)

By Mr. WELCH:

Q. And those a hundred and thirty-one, on January 30th, 1918, are in the same form, are they, that those are in Exhibit Number 14, on March 1st, 1913?

A. I think so.

Q. Well, to be sure, I will offer one of them in evidence, and then there will be no question about it. And is this one of them, from Jacob Armbuster to the plaintiff, dated the 26th of September, 1917?

A. Yes, sir.

239 Q. On premises 537 Butternut Street, and covering liquor tax certificate number 12441 of the series of 1917 and 1918?

A. Yes, sir.

The REFEREE. You better have it marked for identification.

(Assignment, etc., Jacob Armbuster to the plaintiff, marked "Plaintiff's Exhibit Number 16," of this date, for identification.)

By Mr. WELCH:

Q. And you understand, Mr. Witness, that that is added to my question, that this assignment and power of attorney is referred to and marked "Exhibit 16," for identification?

A. Yes, sir.

Mr. WELCH. Now, I offer this statement, Exhibit Number 15, for identification, in evidence.

Mr. TOOMEY. Same objection as before and no further.

The REFEREE. Same objection as before. Objection overruled, an exception to the defendant, and the list is received in evidence.

(List of powers of attorney of city licenses, January 30th, 1918, received in evidence and marked "Plaintiff's Exhibit Number 15," of this date.)

Mr. WELCH. Now, I offer in evidence all of those powers of attorney and certificates of licenses, but you will concede that we simply take Exhibit 16.

Mr. BURDEN. Yes.

240 Mr. WELCH. And I will give you one of these.

Mr. BURDEN. Same objection.

The REFEREE. Same objection to Exhibit Number 16 as heretofore made to other exhibits, objection overruled, an exception to the Government, and Exhibit 16 is received in evidence.

(Assignment, etc., Jacob Armbuster to the plaintiff, received in evidence and marked "Plaintiff's Exhibit Number 16," of this date.)

Mr. WELCH. Now, I deliver to the attorney for the Government a sample one of these, a hundred and thirty-one, from Nicola Albanese to the plaintiff, dated the 6th day of September, 1917, on premises 226 West Belden Avenue, covering liquor-tax certificate Number 12437 of the series of 1917 and 1918. There may be some slight changes in them on account of the law.

Mr. BURDEN. There is a difference in form, or are they all practically the same?

Mr. WELCH. How about that, Mr. Witness?

The WITNESS. They are practically the same. There may be some changes, but the same rights. There is a possibility of some changes.

By Mr. WELCH:

Q. Now, on October 3rd, 1918, how many did the plaintiff have, Mr. Gannon?

A. One hundred and three.

241 Mr. WELCH. I ask to have this list marked for identification.

(List of powers of attorney of city licenses, October 3, 1918, marked "Plaintiff's Exhibit Number 17," of this date, for identification.)

By Mr. WELCH:

Q. And I show you plaintiff's Exhibit Number 17, for identification, and does this list give the name of the individual who gave the power of attorney and the place or address of the place of business which it covers?

A. Yes, sir; it does.

Mr. WELCH. I offer this in evidence.

Mr. BURDEN. Same objection.

The REFEREE. Same objection, same ruling, an exception to the Government, and it is received as Exhibit Number 17.

(List of powers of attorney of city licenses, October 3, 1918, received in evidence and marked "Plaintiff's Exhibit Number 17," of this date.)

Mr. WELCH. I ask to have this marked for identification.

(Assignment, etc., by Jacob Armbuster to the plaintiff, marked, "Plaintiff's Exhibit Number 18," of this date, for identification.)

Now, I offer in evidence these one hundred and three powers of attorney and assignments, and I suggest that we only put in one.

They are all similar, and, instead of putting them all in the
242 record, I offer the one marked for identification, Exhibit 18, in evidence.

Mr. BURDEN. Same objection.

The REFEREE. Same objection, same ruling, an exception to the defendant, and they are received, one to be marked "Exhibit 18."

(Assignment, etc., by Jacob Armbuster to the plaintiff, received in evidence and marked "Plaintiff's Exhibit Number 18," of this date.)

Mr. WELCH. Now, I will give to the attorney for the Government one of these powers of attorney and assignment from Nicola Albanese, dated September 30th, 1918, covering the premises 202 West Belden Avenue, or West Belden Street, over liquor tax certificate, and that seems to be left blank, of the series of 1918 and 1919.

Mr. BURDEN. I move to strike out all these exhibits relating to these powers of attorney and assignments on all the grounds heretofore stated, and on the further ground, and I call the attention of the special master to this, that in the decision of the Supreme Court in the case of Longcoy against the Haberla Crystal Springs Brewing Company they said that they have no value as a lien whatsoever, and I am going to cite that case to you.

The REFEREE. Motion denied.

Mr. BURDEN. An exception.

243 By Mr. WELCH:

Q. Now, from March 1st, 1913, up to January 30th, 1918, you practically had the same number, did you not?

A. Yes, sir.

Q. And you sold your goods in those places, your products, covered by those licenses?

A. Yes, sir.

Q. And did you have the exclusive trade under those licenses at these places?

A. In most of them. There are one or two where we may allow a little or something in there, but practically all of them; yes.

Q. And I note that there was not quite so many on October 3rd, 1918?

A. No.

Q. And October 1st was the time of getting out new licenses for that year, was it not?

A. September.

Q. September 1st?

A. Yes, sir.

Q. And on account of prohibition there were not so many taken out?

A. That is it.

Q. And did you have these liquor-tax certificates prior to March 1st, 1913, those assignments and powers of attorney?

A. Did we?

Q. Yes.

A. Yes.

Q. And you had them for several years prior to that, did you not?

A. Yes, sir.

Q. And some of these, in getting them out, you made allowances on them in different ways?

A. Yes, sir.

Q. And, under those powers of attorney and assignments of
244 licenses, were some of the licenses transferred from the original place to some other place?

A. Yes, sir.

Q. And to different persons?

A. Yes, sir.

Q. In other words, if there was a person running a place in one place and somebody else comes along and buys him out, or something of that kind, a license is transferred to him who bought the place out?

A. Yes, sir.

Q. And, in other words, again, if a person was going to open up a place somewhere else, was this license transferred from some old place to some new place?

A. Yes, sir.

Mr. WELCH. Now, it is in the record, is it not, that your honor and the court have the right in this case to take judicial notice of all the laws of the State of New York?

The REFEREE. There is no question but what I will take notice of them.

By Mr. WELCH:

Q. Do you remember of the plaintiff purchasing a liquor-tax certificate or the rights under it—well, do you remember somewhere in 1912 or '13 of the company purchasing one license?

A. Yes, sir.

Q. In the city of Syracuse?

A. Yes, sir.

Q. From whom was that?

A. John L. Barnett.

Q. Do you remember when that was?

A. October 18th, 1913.

Q. Now, what did they pay for it?

A. Three thousand dollars.

245 Q. Now, Mr. Gannon, in reference to these powers of attorney and these assignments, in your lists here you have given

some of the same names down through and some where they are changed?

A. Yes, sir.

Q. So that under those powers of attorney you had the right to transfer these liquor tax certificates wherever you wanted to, wherever it could be done legally?

A. Yes, sir.

Mr. WELCH. Now, I think that is all.

Mr. TOOMEY. Have you extra copies of these?

Mr. WELCH. I think I can get them and give them to you, if you will give me your address.

Mr. TOOMEY. No cross-examination.

Mr. WELCH. Just a minute. I ask to have this certificate marked for identification.

(Certificate marked "Plaintiff's Exhibit Number 19, of this date, for identification.)

Mr. WELCH. I offer in evidence plaintiff's Exhibit 19, for identification, and I will read it in evidence:

Plaintiff's Exhibit 19

STATE OF NEW YORK,
Office of the Secretary of State, ss:

It is hereby certified that the trade-marks of the Haberle-Crystal Spring Brewing Company, of Syracuse, were placed on file
246 this day. Trade-marks are as follows: "Congress beer," "National ale," "Derby cream ale," and "Haberle."

Witness my hand and seal of office of the secretary of state at the city of Albany, this seventh day of August, one thousand nine hundred and thirteen.

JOSEPH PIDGEON,
Second Deputy Secretary of State.

Mr. BURDEN. We object to that on the grounds of the general objection and, particularly, if it is attempting to show obsolescence of good will, it is already reflected in the statements.

The REFEREE. Objection overruled upon those grounds, and it is received in evidence.

Mr. BURDEN. An exception.

(Certificate received in evidence and marked "Plaintiff's Exhibit Number 19," of this date.)

By Mr. WELCH:

Q. And those names, "Derby cream ale" and "Congress beer," were used by the plaintiff for some years before 1913?

A. Yes, sir.

Mr. WELCH. I think that is all.

Mr. TOOMEY. No cross-examination.

(Discussion outside the record as to adjournment.)

The REFEREE. If there is nothing further, we will now take an adjournment until ten o'clock to-morrow morning.

247 (Reference adjourned until Thursday morning, July 2nd, 1925, at ten o'clock, same place.)

Morning session, Syracuse, New York, Thursday, July 2nd, 1925, 10.00 a. m.

Presiding: Honorable James J. Barrett, referee.

Appearances: Same as before.

CLINTON S. CARR, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Carr, you reside in the city of Syracuse?

A. I do.

Q. And you are an attorney at law?

A. Yes, sir.

Q. And have been for about how many years?

A. Thirty years.

Q. And both before and after you were admitted, you were connected with the Bartels Brewing Company of this city?

A. I was.

Q. And tell us what your business was? You were in the office of White, Cheney & Shinaman and White and Shinaman, in

248 their law office, and connected with them since you have been admitted, have you not?

A. I have.

Q. Now, tell us something about what your business was with the Bartels Brewing Company.

A. They were general attorneys for the Bartels Brewing Company, and I was also in the employ of the company as an attorney.

Q. And did the Bartels Brewing Company, on March first, 1913, and prior and since and up to the time the prohibition law went into effect, have assignments and powers of attorney over liquor tax certificates?

A. They did.

Q. Quite a number of them?

A. A great many.

Q. In Syracuse and elsewhere?

A. Yes, sir.

Q. And here in Syracuse there was a deputy excise commissioner, was there not?

A. Yes, sir.

Q. Who issued the licenses for Onondaga County?
A. Yes, sir.
Q. And in some counties the county treasurer issued them?
A. That is true.
Q. And copies or duplicates of those powers of attorney and assignments of liquor tax certificates were filed with the deputy excise commissioner here in Syracuse?
A. Here in Syracuse, with the deputy commissioner.
Q. For the licenses in Syracuse and in Onondaga County?
A. Yes; and in Onondaga County.
Q. Now, those licenses, of course, under the State law, they were renewed from year to year?
A. Yes, sir.
249 Q. And I show you Exhibit 6 in evidence?
A. (Same examined by witness.)
Q. You have seen those before, I suppose?
A. Many times.
Q. And your company had powers of attorney and assignments similar to that?
A. Yes, sir.
Q. Similar to Exhibit 6?
A. Similar to Exhibit 6.
Q. In which the brewery had control over the liquor-tax certificates and the trade under them?
A. It did.
Q. And assigned them from place to place and from person to person under those powers of attorney and assignments?
A. Yes, sir.
Q. And as to the breweries here in Syracuse, what other breweries were there here besides the Bartels Brewing Company and the Haberle Crystal Springs Brewing Company?
Mr. BURDEN. Now, besides the general objection which we have, I would like to interpose the special objection that it is immaterial and irrelevant to the case under the pleadings.
The REFEREE. How is it material?
Mr. WELCH. If they don't want it, I don't care about the other breweries. If you don't want it, I don't care.
Mr. BURDEN. I do not want to be technical, but I do not see that it helps you prove obsolescence.
The REFEREE. All right. Question withdrawn.
250 By Mr. WELCH:
Q. Now, Mr. Carr, did you know of those powers of attorney and assignments of liquor-tax certificates, by which the control was

given to the breweries, being bought and sold prior to 1913 and in 1913 and afterwards?

Mr. BURDEN. Same special objection, in addition to the general objection.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

The WITNESS. I know of the rights under them being sold and transferred.

By Mr. WELCH:

Q. As represented by this power of attorney?

A. Yes, sir.

Q. Exhibit 6?

A. Yes, sir.

Q. And do you know the value of them back in 1913, of these powers of attorney and assignments, such as Exhibit 6?

Mr. BURDEN. We object to that as too general. We know that it depends on the locality.

Mr. WELCH. I mean when they take it from one place to another.

The REFEREE. I think that is true. You should confine it to the locality of this plaintiff.

Mr. WELCH. Oh, yes. I will add Syracuse.

By Mr. WELCH:

Q. Now, do you know what the assignments and powers of
251 attorney over liquor tax certificates, here in the city of Syracuse, were worth in 1913, March 1st, 1913?

A. The rights, yes, I do.

Q. And you are familiar with them?

A. I am.

Q. And there was a brewers' association in this locality?

A. Yes, sir.

Q. And in 1913 and prior and until prohibition came in?

A. Yes, sir.

Q. And your company belonged to it and the plaintiff in this action belonged to it?

A. Both did.

Q. Now, did you know of several of them being bought and sold around that time and prior to it?

A. I do.

Q. And afterwards?

A. Yes, sir.

Q. And will you tell us what the value of Exhibit 6 and similar powers of attorney and assignments over those liquor-tax certificates on March 1st, 1913, was?

Mr. BURDEN. I object to that upon the grounds of the general objection, and in addition on the grounds that it is incompetent and that no proper foundation has been laid for the question.

Mr. WELCH. What objection have you got to the foundation?

The REFEREE. You do not object to the qualifications of the witness?

Mr. BURDEN. Not at all.

The REFEREE. Well, I think your question is a little improper in form, perhaps.

252 By Mr. WELCH:

Q. You say you did know the market value of them here in the city of Syracuse?

A. I did.

Q. You knew the market value of them?

A. I did.

Q. Now, tell us, on March 1st, 1913, what the assignment and power of attorney over the liquor-tax certificate in Exhibit 6 was?

Mr. BURDEN. The same general objection and the same special objection.

The REFEREE. No objection to the form of the question?

Mr. BURDEN. Why, not especially.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

The WITNESS. What the market value of it was on March 1st, 1913?

The REFEREE. Reasonable and fair market value?

Mr. WELCH. Yes; in Syracuse.

Mr. BURDEN. Same objection.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

The WITNESS. Such rights were worth $2,500.00.

By Mr. WELCH:

Q. And is that true of the one hundred and thirty here in evidence, that is, is that so of all the powers of attorney and assignments, similar to this, held by the plaintiff on that date, here in evidence.

253 Mr. BURDEN. I object to that as calling for a conclusion.

The REFEREE. Yes. Objection sustained.

Mr. WELCH. An exception.

Mr. BURDEN. He said such rights were worth $2,500.00, and that answered your question.

The REFEREE. Do you mean $2,500.00 each?

The WITNESS. I mean $2,500.00 each.

By Mr. WELCH:

Q. Did you know the value of them here in Syracuse, the market value of them, up until the time that the eighteenth amendment was passed?

A. I did.

Q. And tell us what was the market value of them here in Syracuse up until the time of the passage of the eighteenth amendment in December, 1917.

Mr. BURDEN. Same objection, special and general, and immaterial.

The REFEREE. Objection overruled.

Mr. BURDEN. An exception.

The WITNESS. Well, from 1913, they increased after that up to the time we knew the prohibition amendment was going into effect.

By Mr. WELCH:

Q. And to what extent would you say, here in Syracuse?

Mr. BURDEN. I think we ought to put in an objection on the record to this question.

254 The REFEREE. How is that material?

Mr. WELCH. Question withdrawn. I think you can cross-examine.

Cross-examination by Mr. BURDEN:

Q. Just a single question, Mr. Carr. Do you recall the decision of Mr. Justice DeAngelis in the case of Longcoy against the Haberle Brewing Company?

A. I think I read it. I don't know as I recall the details of it, but I read the decision.

Q. And about when was that decision rendered, as you recall it?

A. I should say around 1915 or 1916.

Q. It went all the way up to the Court of Appeals, it was affirmed all the way up and not reversed; the decision stands to-day?

A. Yes; it was not reversed.

Q. And did you take the effect of that decision into consideration, after the same was rendered, with reference to this form of liquor lien, in your practice for your brewery?

A. I knew of the decision, but that did not affect the market value any.

Mr. BURDEN. I did not ask you that, and I move to strike out the last part of the answer as not responsive.

The REFEREE. The last part of the answer may go out.

Mr. BURDEN. I asked the question as carefully as I could. I ask the stenographer to repeat it.

255 (The stenographer repeated the question as follows: "Question: And did you take the effect of that decision into con-

sideration, after the same was rendered, with reference to this form of liquor lien, in your practice for your brewery? ")

The WITNESS. Not to any extent.

Mr. BURDEN. That it all.

Redirect examination by Mr. WELCH:

Q. Did that decision change, in your opinion, the market value of those assignments and powers of attorney?

Mr. BURDEN. I object to that as calling for a conclusion.

The REFEREE. I think the decision in the Longcoy case is for the special master. I sustain the objection.

Mr. WELCH. An exception. I think that is all. I will call Mr. Nugent.

256 CORNELIUS J. NUGENT, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Nugent, you reside in the city of Syracuse?

A. I do.

Q. And what is your business now?

A. Retail coal.

Q. And were you at one time connected with the George Zett Brewery?

A. I was.

Q. For about how long a period?

A. Sixteen years.

Q. About what time did you go in?

A. Well, it was from 1907 to 1913.

Q. And you were also a member of the Brewers' Exchange here in the city of Syracuse?

A. I was treasurer of that.

Q. And did you know of assignments of liquor tax certificates and powers over them, that gave the brewery the control over them, being bought and sold in 1913?

A. I did.

Q. And do you know the value of those liquor tax certificates and control over them, as represented by Exhibit 6, in 1913, March 1st?

A. I do.

Q. Now, are you able to tell us the fair market value of Exhibit 6 there, in the city of Syracuse, on the first day of March, 1913?

A. Yes.

Q. And I will now ask you, in your opinion, what was the fair market value of this Exhibit 6 on March first, 1913?

257 Mr. BURDEN. We object, in addition to the grounds of the general objection to the testimony of all witnesses, upon the special ground that this is incompetent and no proper foundation laid within the pleadings for the testimony.

The REFEREE. Same ruling. Objection overruled. It is received upon the question of the obsolescence of good will and intangible assets.

Mr. BURDEN. And an exception to the defendant.

By Mr. WELCH:

Q. You may answer. What would you say that was worth?

A. At least $2,500.00.

Q. And were all the similar ones in effect, held by a brewery of that kind, at that time worth that amount?

A. Yes; no difference.

Q. I mean each of them; no difference?

A. No difference.

Mr. WELCH. You may cross-examine.

Mr. BURDEN. No cross-examination.

The REFEREE. Mr. Nugent, what is your estimate based on?

The WITNESS. On specific cases of purchases.

The REFEREE. Did the company usually pay the fee for that license that was issued to the owner of that place?

The WITNESS. They embodied it in the purchase price, and
258 the purchase price was made on a situation having a license and in no other way.

The REFEREE. Do you object to my questions?

Mr. BURDEN. Only the general objection.

The REFEREE. Objection overruled, and an exception to the Government. That is all.

Mr. WELCH. That is all. I will call Mr. Sembach.

WILLIAM E. SEMBACH, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Sembach, you reside in the city of Syracuse?

A. I do.

Q. And have for a number of years?

A. Yes, sir.

Q. And at one time you were connected with the Thomas Ryan Consumers' Brewing Company?

A. Yes, sir.

Q. And for what length of time?

A. From 1907 to the present time.

Q. And were you connected with the Brewery Exchange?

A. Yes, sir.
Q. Here in Syracuse?
A. Yes.
Q. A member?
A. Yes; secretary.

259 Q. Now, do you know of powers of attorney and assignments of liquor tax certificates, similar to Exhibit 6, being taken and given in March, March 1st, 1913, and during that year?

A. What was that question, please?
Q. Did you know of similar powers of attorney being taken and given, and assignments?
A. Yes, sir.
Q. By which the brewery taking the power of attorney and assignment had control over the place and the license?
A. Yes, sir.
Q. And the trade under it?
A. Yes, sir.
Q. Now, did you know the fair market value of Exhibit 6 on March 1st, 1913, in the city of Syracuse?
A. Yes.
Q. And what, in your opinion, was it worth on March 1st, 1913?
Mr. BURDEN. We interpose the general objection, and the special objection that no proper foundation has been laid for the testimony and that it is not within the pleadings and immaterial to this case.
The REFEREE. Objection overruled.
Mr. BURDEN. An exception to the Government.

By Mr. WELCH:

Q. What was it worth, Mr. Sembach?
A. We considered it worth $2,500.00.
Q. And you knew of them being bought and sold in the city of Syracuse around that time?
A. Yes, sir.
Q. And prior to it and since?
A. Yes, sir.

260 Q. And did it continue to have at least that market value here in Syracuse up until the time of the passage of the eighteenth amendment?

Mr. BURDEN. We object to that as a special objection, that it is wholesaling and calls for a conclusion and incompetent.
The REFEREE. How is that material?
Mr. WELCH. I don't know as it is, if they object to it.
The REFEREE. It is speculative. Objection sustained.
Mr. WELCH. An exception.

By Mr. WELCH:

Q. Now, my question and the value you gave was relative to Exhibit 6. Now, does your value apply to all the powers of attorney, all the similar powers of attorney and assignments that the plaintiff had at that time?

A. Yes; it does.

Q. And covering places in the city of Syracuse?

A. Yes, sir.

Q. Now, Mr. Sembach, I suppose you are somewhat familiar with the products of the plaintiff, the Haberle Crystal Springs Brewing Company?

A. Yes.

Q. And its lager beer, were you familiar with the name it went under?

A. Yes.

Q. What was it?

A. Congress.

Q. Tell us something about how extensive it was known in the trade?

Mr. BURDEN. Well, I object to that as incompetent, in addition to the general objection, and that it is wholesaling the evidence
261 and no proper foundation laid for it, and you can't prove reputation from the speech of the people of the community, or otherwise, by this witness.

The REFEREE. I think I will receive it and let him tell what he knows about it. Objection overruled.

Mr. BURDEN. An exception.

The WITNESS. The general name of "Congress" was known more by people than the Haberle Crystal Springs Brewing Company. It was the name of their beer and people went in and would call for "Congress" beer.

By Mr. WELCH:

Q. People would go into places and call for "Congress" beer?

A. Yes, sir.

Mr. BURDEN. I move to strike it out on the grounds stated in the objection.

The REFEREE. Yes. I think that is true. It is stricken out. He can tell what he observed.

By Mr. WELCH:

Q. What did you see about it; did you see it yourself?

A. Yes, sir.

Q. Did you see it advertised?

A. Yes, sir.

Q. Where did you see it advertised?

A. Quite extensively all over, on signs, entrances to restaurants, in restaurants, and so forth.

The REFEREE. You knew that was the name of the beer manufactured by the Haberle Crystal Springs Brewing Company and used wherever that beer was sold?

The WITNESS. Yes, sir.

262 By Mr. WELCH:

Q. And you heard people call for Congress beer?

A. Many times.

Q. Now, how about the Derby Cream Ale?

A. That was the product of the National.

Q. That was ale?

A. That was ale.

Q. And tell us what you knew about that being advertised.

A. Well, that applies the same way as to the Congress.

Q. In other words, their ale was sold under the name of "Derby Cream Ale"?

A. Their ale was sold under the name of "Derby Cream Ale."

Q. And you saw signs advertising it extensively; did you?

A. Yes, sir.

Q. And did you hear people call for it?

A. Yes, sir.

Q. And you heard and saw those two names used before 1913?

A. Yes, sir.

Q. And advertised extensively in the city of Syracuse and elsewhere?

A. Yes, sir.

Mr. WELCH. You may cross-examine.

Cross-examination by Mr. BURDEN:

Q. Mr. Sembach, in testifying to the market value of these licenses, as you have testified, I take it you took into consideration the rate of license paid to the State of New York at the time you mentioned?

A. I don't quite get your question.

Q. Well, it was the Raines law in 1913, in the State of New York, wasn't it, that imposed licenses on saloons, and so forth?

A. Oh, yes.

263 Q. Now, take this one in question, covered by Exhibit 6, what was the license fee exacted by the State of New York annually on that place?

A. I believe a thousand dollars; I believe that, or it might have been twelve hundred.

Q. Did the rate change as to the license fee paid by saloons between 1910 and 1920?

A. Oh, yes.

Q. Which way, what was it?

A. It increased.

Q. And can you tell us from the best of your recollection, now, I don't except you to be absolutely accurate, but to the best of your recollection, what it was from year to year?

A. Well, I can remember it was $750.00; I can remember it was $1,000.00; I can remember it was $1,200.00, $1,300.00, $1,400.00, and $1,500.00. I believe it went on a scale, I believe it did, up to a certain time.

Q. In 1918, $1,500.00?

A. $1,500.00, in 1918.

Q. Now, was the rate on hotels larger than the rate on saloons under the Raines law, in the State of New York?

A. Not as far as the city of Syracuse was concerned. These licenses I am talking about, $1,500.00, means the city of Syracuse.

Q. Yes; that is what I am talking about. Of course, these rates of license fees, about which you and I have been talking, had nothing to do with the Federal tax of the Internal Revenue Bureau at those times?

A. No, sir.

Q. You say no, it did not have any?

A. No; that had nothing to do with it, the Federal.

Mr. BURDEN. That is all.

Mr. WELCH. That is all at this time.

264 (Discussion outside the record as to adjournment.)

The REFEREE. We will now take an adjournment until Tuesday, August 25th, 1925, at ten o'clock in the morning, at this place.

(Adjournment taken until Tuesdays, August 25th, 1925, 10.00 a. m., Post Office Building, U. S. district attorney's office, Syracuse, New York.

MINUTES OF HEARING, AUG. 25, 1925

In the United States District Court, for the Northern District of New York

THE HABERLE-CRYSTAL SPRING BREWING COMPANY, plaintiff AGAINST JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE for the 21st District, New York, defendant	At law, No. 858

Minutes of adjourned proceedings had in the above-entitled matter before Honorable James J. Barrett, referee, in the United States

district attorney's office, Post Office Building, Syracuse, New York, commencing on Tuesday, August 25th, 1925, at 10.00 a. m., daylight-saving time.

265 Presiding: Honorable James J. Barrett, referee.

Appearances: Messrs. Welch & Welch, Syracuse, New York, attorneys for the plaintiff. Honorable Oliver D. Burden, United States district attorney; H. V. S. Grosbeck, assistant United States district attorney, Northern District of New York; F. F. Toomey, solicitor, Treasury Department, Washington, D. C.; and Frank B. Hudson, inspector, 21st district, New York; for the Government, defendant.

JOHN J. ZAHM, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Zahm, where do you reside?

A. Buffalo, New York.

Q. How long have you lived in Buffalo?

A. About fifteen years.

Q. And prior to that did you reside in Syracuse?

A. I did.

Q. And how long did you live in Syracuse?

A. Twenty-one or two years.

Q. Before you went to Buffalo?

A. Well, there was an interim between, or two. I lived in New York, and I was in New Haven for a while with my business in New York, and I lived in Chicago for a year or more.

266 Q. Now, while in Syracuse, what was your business, Mr. Zahm?

A. I was a brewer at the Crystal Spring Brewery.

Q. That was afterwards known as the National plant of the Haberle Crystal Springs Brewing Company?

A. As the National plant of the Haberle Crystal Springs Brewing Company; yes, sir.

Q. Before they amalgamated and went together, you were with the Crystal?

A. Yes, sir; and it was still known as the Crystal after the amalgamation, until the old National plant was abandoned.

Q. Now, you were a brewer for several years; were you?

A. Yes; I was there about ten years.

Q. And were you familiar with the Haberle plant on Butternut Street, the Haberle Crystal Springs Brewing Company's plant?

A. I was; yes.

Q. And did you ever do any brewing there?

A. I did not.

Q. But you were familiar with this plant and the machinery and all that stuff?

A. Oh, yes.

Q. And were you familiar with the product they made?

A. I was.

Q. And one of its products was lager beer known as Congress beer?

A. It was.

Q. An another product of the company was the ale that it brewed at the National known as Derby Cream ale?

A. Yes, sir.

Q. Which was formerly the Crystal?

A. Yes, sir.

267 Q. And those beers under those names were extensively known throughout central New York; were they?

A. I believe they were.

Q. And advertised and sold as such?

A. Yes, sir; they were.

Q. Now, you have made some study of chemistry, have you not, Mr. Zahm?

A. I have spent practically all my life in the industry from a technical standpoint.

Q. In the brewing business?

A. Yes, sir.

Q. And what is your business now?

A. I am president of the Zahm and Nagle Company of Buffalo, who are manufacturers of evaporating apparatus, particularly for the dealcoholization of beer.

Q. And thus make it less than one-half of one per cent?

A. Yes, sir.

Q. Now, Mr. Zahm, have you been in that business since prohibition went in?

A. I have.

Q. And you are making machinery to make a palatable soft drink of less than one-half of one per cent?

A. Yes, sir.

Q. Now, tell us something about that machinery; what it is?

A. I think probably I better tell you the reason why such a machine was made.

Q. Yes; go on and tell us.

A. When the prohibition law was enacted and put in force and which stopped the brewer from making beer, he naturally sought some method to utilize a part of his plant, or, in other words, to get

into some other business, and he started to make a beverage
268 containing less than one-half of one per cent of alcohol to comply with the Federal ruling, and at the same time make that from malt, the idea being to have extract matters in it differing from the cane sugar ordinarily found in the sweet drinks, and without alcohol above the five-tenths of one per cent by volume, and to make a beverage which was palatable. It was found that in order to obtain extract matter which had a desirable composition, that is, a composition such as they had had in beer, that a fermentation was necessary to produce that; that is, in order to eliminate the fermentable sugars from a work produced from malt or other cereals, that is, in order to eliminate the fermentable sugars from a work produced from malt or other cereals, it became necessary after this work had been subject to fermentation, to remove the alcohol to a point below five-tenths of one per cent by volume, and the only method which presented itself for this purpose was the removal of the alcohol by evaporation, in other words, boiling.

In addition to the sugars, which we call them the carbohydrates, most of which are unfermentable, that is, after the work has been subject to fermentation, there is a slight residue of fermentable sugar. The nitrogenous bodies, which are commonly known as albuminodio, play quite an important rôle in that composition, and in boiling the liquid, that is, in boiling this beer to remove the alcohol, the liquid was subject to a temperature at which a liquid boils, this liquid having a boiling point very near that of water, 212
269 Fahrenheit, and at this temperature, a portion of these albuminoids or albuminous matter was coagulated, which effected a reduction in the albuminoid content and a corresponding loss in fullness or character of the product.

During fermentation the real flavor of a beer, which lies principally in volatile products, which we term esters, they are formed, and these are even more volatile than the alcohol and are also lost in the boiling process. In fact, a beer which is raised to the boiling point and without any material reduction in alcoholic content loses practically its entire beer flavor.

Subjecting this beer to a boiling action for a period of several hours, which time was required to reduce the alcoholic content to the required point, also imparted a cooked taste, which was very objectionable as far as the palatitability of the resulting product was concerned. In other words, a beer dealcoholized in an open kettle lost the flavor, the esters, lost a portion of the desired albuminoids, which it contained, and acquired a cooked taste.

In order to prevent the coagulation of this albuminous matter and also the cooked taste which were acquired during this boiling process,

it became necessary to reduce the boiling point to a temperature below the coagulating point of albuminoids and at which temperature no cooked taste would be imparted to the product.

270 For this reason we designed a special vacuum apparatus in which the temperature, the evaporating temperature, was reduced to a point which is usually in practice 140 degree Fahrenheit, and so arranged the apparatus that the product was exposed to this temperature for a very short time only, in fact, a matter of seconds, the beer entering in a cold state and within a period of less than three minutes, which includes the time required for displacement of the liquid in the various parts of the apparatus, the realcoholized product left the apparatus in a cold condition.

In reference to the esters, which imparted practically all of the flavor to the product, we devised apparatus to collect these esters, together with the gas which the beer contained, and incorporate these esters with the dealcoholized product leaving the apparatus.

Does that explain the reason for building this apparatus?

The REFEREE. Is this apparatus in the plant used in the plant of the Haberle Crystal Springs Brewing Company?

The WITNESS. It is not.

Mr. BURDEN. Just before your question, Judge Barrett, I would like to move to strike out the testimony upon the grounds stated in the objection, the testimony given in the last question and answer.

The REFEREE. I will reserve decision on your motion at this time.

Mr. BURDEN. An exception.

271 By Mr. WELCH:

Q. Now, you were familiar with the beer made at the Haberle plant prior to prohibition?

A. Yes.

Q. And were you familiar with the product they could produce after prohibition up there?

A. I have tasted it; yes.

Q. Now, could they produce in this plant a product of less than one-half of one per cent by volume that was similar to that they produced prior to prohibition?

Mr. BURDEN. We object to that upon the general grounds submitted to each question and also upon the special ground that it calls for a conclusion and no proper foundation laid.

Mr. WELCH. I probably might add to my question, "that was similar in taste or effect to that they produced prior to prohibition"?

Mr. BURDEN. Same objection.

Mr. WELCH. I will change that question.

The REFEREE. Question withdrawn.

By Mr. WELCH:

Q. Could the plaintiffs in their plant on Butternut Street after prohibition went into effect, make or produce with that plant and machinery a product that was similar in taste and effect to that they produced prior to prohibition?

Mr. BURDEN. And the same special objection and, of course, the general objection.

The REFEREE. Any objection to the qualification of the witness?

272 Mr. BURDEN. No.

The REFEREE. What is the question?

(Question repeated by the stenographer as follows: "Question. Could the plaintiffs in their plant on Butternut Street, after prohibition went into effect, make or produce with that plant and machinery a product that was similar to taste and effect to that they produced prior to prohibition?")

The WITNESS. Are you ready for the answer?

Mr. TOOMEY. Of course, we urge the further objection to that that it is immaterial upon the question as to whether or not the good will of the corporation and its business before prohibition would be useful to the building up of a trade in the business which they undertook after prohibition.

The REFEREE. Well, I will overrule the objection, reserving the right to the Government to move to strike out afterwards and giving the Government an exception to the ruling.

Mr. BURDEN. Yes; an exception.

The WITNESS. They could not.

The REFEREE. Why not?

Mr. BURDEN. Same objections.

The REFEREE. Same ruling.

Mr. BURDEN. And an exception.

Mr. TOOMEY. And that is understood?

273 The REFEREE. Yes, sir.

Now, why not, Mr. Zahm?

The WITNESS. They did not have facilities for doing that, and, in fact, facilities for doing it did not exist at that time. They have been developed since then.

Mr. BURDEN. I move to strike out on the grounds stated in the general and special objections.

The REFEREE. Same ruling. I will reserve decision on the motion to strike out.

Mr. BURDEN. And an exception.

By Mr. WELCH:

Q. I suppose that the plant, that the vats and casks and some of it could be used for a milk plant, chemical works, paint works, or vinegar plant, or something of that kind, to some extent; could it not?

Mr. BURDEN. That is a supposition and we object to it on the general grounds.

The REFEREE. I will sustain the objection.

By Mr. WELCH:

Q. And do you require at the present day considerable investment in machinery to make a beer——

Mr. BURDEN (interrupting). Same objection and calling for a conclusion and no foundation laid.

The REFEREE. Do you mean to make the beer as it was before prohibition?

274 Mr. WELCH. No. I did not finish my question.

The REFEREE. Question withdrawn.

By Mr. WELCH:

Q. I think he will probably answer this question. Now, you partook of the beer, I assume, that they made prior to prohibition—Congress lager?

A. Yes, sir.

Q. And you tasted that which they had made since?

A. Yes, sir.

Q. Now, I will ask you, you have had quite an experience in that business, tasting beer, testing beer, and making beer; have you?

A. I have.

Q. Both before and after prohibition?

A. Yes.

Q. Now, I will ask you whether there was any similarity of the beer or beverage they made since prohibition containing one-half of one per cent, or less than one-half of one per cent, and that they made prior to prohibition containing about four per cent of alcohol, other than the looks of it and the foam on it?

Mr. BURDEN. We have the same objection. In fact, I presume that is a question for the referee to decide. Is it not?

Mr. TOOMEY. Yes.

The REFEREE. I think I will sustain the objection to that.

Mr. WELCH. An exception.

By Mr. WELCH:

Q. In that plant after prohibition went into effect, by this
275 boiler process, boiling out the alcohol or evaporating it, could they make a palatable drink?

Mr. BURDEN. In addition to the general objection, it is objected to as immaterial.

The REFEREE. You have asked him if they could use this same plant to make the same beer; have you not?

Mr. WELCH. I think probably that is so.

The REFEREE. Objection sustained. Exception to the plaintiff.

Mr. WELCH. You may cross-examine.

Mr. BURDEN. Perhaps a single question will suffice. If the court please, I understand that there are general and special objections interposed to the testimony and a reservation of our rights to strike out later.

The REFEREE. Yes.

Mr. BURDEN. While the witness is on the stand, he is an expert and we concede that, we would like to ask him, for the information of the court, whether or not—well, I will withdraw the question. No cross-examination.

The REFEREE. Is that all?

Mr. TOOMEY. Yes.

The REFEREE. Is that all, Mr. Welch?

Mr. WELCH. I think that is all.

The REFEREE. That is all, Mr. Zahm.

Mr. WELCH. You don't need him any more?

Mr. BURDEN. No.

276 Mr. WELCH. I think I will call Mr. Biehler at this time.

FRANK C. BIEHLER, recalled as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Biehler, I think that you stated that prior to prohibition that the bulk of your business was selling by the barrel, did you not; that is, in bulk?

A. Yes, sir.

Q. Of the beer and the ale?

A. Yes, sir.

Mr. BURDEN. I think, if the court please, it is unnecessary to state that we have the general objection and exception all the way through his testimony.

The REFEREE. Yes. Same objection and ruling and exception all the way through.

By Mr. WELCH:

Q. And what you sold by the bottle was a small percentage of your business?

A. Yes, sir.

Q. Now, was there any difference in the profit of selling beer by bulk or by the bottle?

A. Why, our entire profits were obtained from selling beer in bulk. Our bottle business was usually conducted at a loss.

Q. Now, after prohibition went into effect and you undertook to make this beverage of less than one-half of one per cent; how was that conducted?

277 A. Why, the conditions were completely reversed. Most of our product was sold in the bottle and a very small percentage in the bulk.

Q. And was that more expensive?

A. Well, it was much more expensive to bottle it than it was to place it in bulk, and, therefore——

Q. (Interrupting.) Now, in regard to making it where you decholizing it. Now, after the beer was made, then you had to take the alcohol out by boiling in the kettle; did you not?

A. By reboiling; yes, sir.

Q. And was that expensive?

A. Well, it doubled the price of labor and doubled the price of steam and also added to the material cost original cost of the materials was greater.

Q. Now, the beer that you made prior to prohibition, as you testified, contained an alcoholic content of around four or four and a half per cent?

A. Yes, sir.

Q. Now, what effect would that alcoholic content of the beer have upon its demand?

A. Why, it was the stimulating effect of the beer that sold it. After prohibition came on, in the manufacture of near beer, that was lacking. There was no demand. The demand was entirely obliterated for beer with the alcoholic content out.

Q. Prior to prohibition, was there a large and stable demand for beer containing around four per cent of alcohol?

A. There was.

Q. And it was so, I suppose, throughout the State, was it not?

A. And throughout the Nation; yes, sir.

278 Q. And what would you say about the demand for this one-half of one per cent that you were able to make?

A. Well, the demand fell off to almost nothing.

Q. So that you operated at a loss after prohibition?

A. We have operated at a loss continuously since prohibition.

Q. Now, you testified, I think, that it cost more to make the less than one-half of one per cent beer?

A. Yes, sir.

Q. Now, Mr. Biehler, in reference to the National plant, about the time prohibition was going in, did the plaintiff undertake to turn that into a cold-storage plant?

A. They did.

Q. Well, tell us something about what they did and what they expended.

A. Why, the Haberle Crystal Springs Brewing Company started work on their plant by placing elevators in there, putting insulations in the buildings for the purposes of cold storage, completely gutting the buildings of machineries such as brewing machinery, and had spent about forty thousand dollars in the work when it sold it to the Haberle Securities Company.

Q. When did they sell it?

A. When did they sell it?

Q. Yes.

A. I have got that right here. On December 31st, 1921.

Q. After spending and laying out forty thousand dollars in trying to change it over to a cold storage?

A. Yes, sir.

Q. In other words, they sold the plant, the fixtures and everything connected with it?

279 A. Sold the entire plant and the fixtures remained there for one hundred thousand dollars, to the Haberle Securities Company, on December 31st, 1921.

Mr. WELCH. I think you can cross-examine, and if there is anything else I think of I will take it up later, if I may.

Cross-examination by Mr. TOOMEY:

Q. When was the Haberle Securities Company organized, Mr. Biehler?

A. I will look that up and see. January first, 1922.

Q. It was organized for the purpose of taking over the National plant?

A. What is that?

Q. Was it organized for the purpose of taking over this National plant?

A. It was organized for the purpose of taking over the remaining—yes; that was part of the assets.

Q. Who were the incorporators of that company?

A. Who are they?

Q. Who were they?

A. Why, they were myself, Benedict Haberle, Carl E. Haberle, Warren E. Haberle, Carl F. Woese, George J. Gannon, and Walter Welch.

Q. And the incorporators and stockholders and officers of the company were substantially the same as those of the Haberle Beverage and Products Company; were they not?

A. No.

Q. Well, they were—the stockholders were absolutely the same; were they not?

A. Well, they were not the same.

280 Q. Well, I mean the individuals you just named?

A. Some of them were.

Q. Which ones were not?

A. Mr. Carl Woese was not. Just a minute. Just ask me that question again. I don't really get the question.

The REFEREE. Which ones were not?

The WITNESS. Which ones were not what?

Mr. TOOMEY. I think I can clarify the question.

By Mr. TOOMEY:

Q. The gentlemen whose names you have just given us were stockholders of this Haberle Securities Company. Now, which of these gentlemen whom you have named were not stockholders in the Haberle Beverage and Products Company?

A. Oh, Carl Woese, I think, is the only one.

Q. Which of those gentlemen were not stockholders in the old Haberle Crystal Springs Brewing Company?

A. Carl Woese.

Q. In what form was the consideration of one hundred thousand dollars paid?

A. A mortgage was given for it.

Q. A what?

A. A mortgage; a real-estate mortgage on the plant was given for it.

Q. Is the business of the Haberle Securities Company to-day the same as it was in January, 1922?

A. It is not.

Q. What is its business to-day?

A. It is in the process of liquidation right now.

Q. Well, what was its business prior to the time the liquidation was started?

A. Well, it owned securities it had purchased from the

281 Haberle Crystal Springs Brewing Company and it owned property here in the city of Syracuse that it had purchased from members of the family that had owned it, valued at nine hundred thousand dollars at that time.

Q. What is the National plant being used for to-day?

A. Cold-storage purposes.

Q. Who is the owner of it?

A. Central City Cold Storage Company.

Q. When was that organized?

A. I will see if I have got that date here.

Q. Approximately. I don't care about it exactly.

A. November 30th, 1922.

Q. It acquired the National plant from the Haberle Securities Company, did it not?

A. Yes, sir.

Q. What was the consideration?

A. One hundred thousand dollars.

Q. In what form was that consideration paid?

A. By taking over that real-estate mortgage, one hundred thousand.

Q. The Central City Cold Storage Company has its headquarters to-day in the National plant on Burnet Avenue, has it not?

A. Yes, sir; it has.

Q. Were the names "Congress" and "Derby" ever used after prohibition went into effect in connection with the sale of cereal beverages?

A. The name "Derby Ale" was never used, that I recall.

Q. Was the name "Congress" used?

282 A. Not by the Haberle Crystal Springs Brewing Company.

Q. Was the name "Congress" ever used by the Haberle Beverage and Products Company?

A. Not "Congress beer"; no, sir.

Q. Well, was the name "Congress"?

A. The name "Congress" was used, but not "Congress beer."

Q. Well, beer was prohibited?

A. Well, our name prior to prohibition was "Congress beer."

Q. That is all right, but the name "Congress" was used in connection with the advertisement and the sale of cereal beverages by the Haberle Beverage and Products Company?

A. It was, "Congress."

Q. And so was also the name "Derby"?

A. No, sir; I do not recall that any labels were used with the name "Derby."

Q. Isn't it a fact, Mr. Biehler, that the name was used in the advertisements used by that company and under which that company advertised its cereal beverages?

A. I do not recall any such as to "Derby"; it might be possible. We never bottled any beer under that name.

Q. I am asking you if you advertised?

A. I don't recall any such ad. It might have been some directory ad, but I don't know anything about it.

Q. I hand you what purports to be a City Directory of the city of Syracuse for 1922–23. Now, refer to page 1221 of that directory, and I ask you if that is not an advertisement of the
283 Haberle Beverage and Products Company, Incorporated?

A. Yes, sir.

Q. And they did advertise their products under the names "Congress" and "Derby" then?

A. Not Derby Cream Ale.

Q. Under the name "Derby"?

A. Yes, sir.

Q. I will ask you this question: Why did the Haberle Beverage and Products Company use the name "Congress" and the name "Derby" in connection with their cereal beverage business?

A. Well, I don't know. I was not responsible for that.

Q. And that is your answer to the question?

A. Yes, sir; it is.

Q. Do you believe that a name which would be of value in the beer business, liquor business before prohibition, would be of any value in the advertisement and the building up of a demand for the cereal beverage?

A. No; I do not. It has proven not to be true.

Q. All right, let's see. You recall the name Budweiser, do you not?

A. Yes, sir.

Q. Probably one of the most prominent trade names under which beers were put out before prohibition; was it not?

A. One of the most.

Q. Isn't it a fact, Mr. Biehler, that that is one of the most widely advertised cereal beverages on the market to-day, under the name "Budweiser"?

A. Why, that I don't know. I know they used the name "Beevo" and spent millions of dollars on that.

284 Q. You have travelled about the country, have you not, a great deal, Mr. Biehler?

A. Why, I have travelled around some.

Q. Have you ever noticed in passing through the large cities like Chicago, Philadelphia, and New York, the most conspicuous electrical displays attached to any beverage carry the name "Budweiser" to-day; have you ever noticed that?

A. No; I have not.

Q. All right.

Mr. TOOMEY. We wish, at this time, to offer in evidence page 1221 of the Syracuse Directory for the year 1922–1923.

Mr. WELCH. Do you mean that which refers to the Haberle Beverage and Products Company?

Mr. BARRETT. He offers the page in evidence, as I understand it.

Mr. TOOMEY. I offer the page in evidence.

Mr. WELCH. The whole page?

The REFEREE. Yes; the offer covers the whole page.

Mr. WELCH. Well, there are other advertisements there and it covers other breweries.

Mr. TOOMEY. We offer the whole page to show that it is with other advertisements thereon contained.

Mr. WELCH. Your honor, I do not think the whole page is competent. I do not object to what relates to the Haberle Beverage and Products Company.

285 The REFEREE. Let me see it. What page is it?

Mr. WELCH. 1221.

The REFEREE. Well, the whole page is not material.

Mr. TOOMEY. Well, I don't care for the whole page and I do not contend it is material.

The REFEREE. You simply offer page 1221 in so far as the advertisement of the Haberle Beverage and Products, Inc., appears thereon?

Mr. TOOMEY. Yes.

The REFEREE. All right. Received.

(Page 1221, in so far as it relates to the Haberle Beverage and Products Company, received in evidence and marked "Defendant's Exhibit No. 2," of this date.)

Mr. WELCH. Why not read that into the record and then it will be there?

The REFEREE. It will be made a part of the record.

Mr. TOOMEY. That is all.

(Defendant's Exhibit No. 2 is as follows:

Defendant's Exhibit 2

Page 1221, Syracuse City Directory, 1922–1923

286 HABERLE BEVERAGE & PRODUCTS CO., INC.

Highest Quality Products—Congress, Congo, Root Beer, Derby, Ginger-special, Orange Cheer, Sweet Cider

HABERLE SECURITIES CO., INC.
Office 500–522 Butternut St., Syracuse, N. Y. Phones 2–2155—2–0052

Mr. WELCH. Mr. Biehler, just a question or two.

Redirect examination by Mr. WELCH:

Q. You stated that the Haberle Securities Company was organized on January first, 1922. Now, that is when they took this prop-

erty over, but I think the company was organized in 1921. Now, are you sure about the dates?

A. Well, I had the date here at the time it was taken over. Now I see I may be mistaken as to that.

Mr. WELCH. As a matter of fact that ought to be corrected. It was organized in the latter part of the year 1921.

Mr. TOOMEY. Well, that is the date it was organized, just before this transfer.

Mr. WELCH. Yes.

The REFEREE. Now, what is that date?

Mr. WELCH. That was organized in the latter part of the year 1921; that is, the Haberle Securities Company.

287 The REFEREE. And is that true, Mr. Biehler?

The WITNESS. Yes. It started operations on January first, 1922, didn't it?

Mr. WELCH. Yes.

Mr. TOOMEY. No objection to that.

By Mr. WELCH:

Q. And the Central City Cold Storage Company was organized in 1922, the latter part of that year?

A. November 30th, I have got it here, started operating.

Q. Now, you were asked, Mr. Biehler, about the word "Congress" and the word "Derby" and as to this advertisement in the Syracuse Directory, but your product was sold under the name of "Congress Beer"?

A. Yes, sir.

Q. And under the name "Derby Cream Ale" and not "Derby"?

A. Yes, sir.

Q. Now, you were asked in regard to the "Budweiser." To call this beer that you were making of less than one-half of one per cent "Congress Beer," that you could not do?

A. No, sir.

Q. And to call it "Congress," or to represent that it was the same as the old "Congress Beer," would be a fraud in that respect, wouldn't it?

A. Yes, sir.

Mr. BURDEN. Oh, that is objected to as a conclusion.

The REFEREE. Oh, yes. There isn't any claim that there is any fraud, and I think I will sustain the objection.

288 Mr. WELCH. No; but it is the same as to Budweiser. An exception.

By Mr. WELCH:

Q. Now, as to the word "Budweiser" and its use; prior to prohibition that had an alcoholic content of around four per cent, did it not, prior to prohibition?

A. Yes, sir.

Q. And does the word "Budweiser" mean or convey to you the idea that it contained that alcoholic content that gave it its demand?

Mr. BURDEN. That is objected to as calling for something that is in the mind of the witness.

The REFEREE. I think that is true. There isn't any claim of that kind here, Mr. Welch. Objection sustained.

Mr. WELCH. An exception.

By Mr. WELCH:

Q. Did the words "Congress" or "Derby," that appeared in that directory, result in any added demands on the sale of your product containing less than one-half of one per cent that you made?

A. No; it did not.

Mr. BURDEN. We object to that for the reason that the witness has already said he did not know it was so advertised.

Mr. WELCH. Well, if it was so advertised?

Mr. BURDEN. Objected to as calling for a conclusion of the witness.

The REFEREE. Objection sustained.

289 The WITNESS. Your honor, I did not make the statement I did not know about "Congress" being advertised. I did make the statement that I did not know "Derby" was used.

The REFEREE. You made the statement you did not know that advertisement was in there?

The WITNESS. In reference to "Derby."

Mr. WELCH. Well, I suppose it is on the record, whether the use of "Congress" or "Derby" would add anything to it, on the ground that it could not have the quality that the other had.

The REFEREE. Why don't you ask him that question then?

Mr. WELCH. What is that?

The REFEREE. Ask him that question, whether or not the "Congress" as advertised there and the "Derby" had the same qualities that they had before the prohibition act was passed.

Mr. TOOMEY. We will concede that they did not.

Mr. WELCH. You will concede that?

By Mr. WELCH:

Q. Well, did the product advertised as "Derby" or "Congress" have the same qualities, if you did advertise them, after prohibition, the product you then made, that the product you made prior to prohibition had?

A. No.

Mr. WELCH. And that I understand counsel concedes?

290 Mr. TOOMEY. Yes.

Mr. BURDEN. Same general objection and the usual special objection.

The REFEREE. Objection overruled and decision reserved on the motion to strike out.

Mr. BURDEN. And an exception.

By Mr. WELCH:

Q. One question: Did any of your advertising that you did in any manner after prohibition went into effect, bring back any of your former trade that you had prior to prohibition?

A. No, sir.

Mr. BURDEN. Same objection and calling for a conclusion and no foundation laid.

The REFEREE. Objection overruled. I will permit him to answer, if he knows.

The WITNESS. No, sir; it did not.

Mr. BURDEN. And an exception to the Government.

Mr. WELCH. I think that is all that the plaintiff has from Mr. Biehler at this time.

Mr. TOOMEY. Wait just a minute, Mr. Biehler.

Recross examination by Mr. BURDEN:

Q. Well, the Government would like to know whether or not you kept a separate set of accounts relating to the different brands which the Haberle Crystal Springs Brewing Company formerly used, so you can tell by the figures or anything to which you can refer,

291 as to whether or not you had a demand for those brands or not?

A. Yes, sir; we can.

Q. Did you keep them separately?

A. We had kept them separately prior to prohibition.

Q. And how about after?

A. Well, we abandoned entirely our ale part of it, and we operated on the one, and, therefore, we had nothing from the ale.

Q. You had no separate set of accounts?

A. We had no such thing as "Derby" to sell. We made no such thing and had no such thing to sell, and the advertisement that appeared in that is a copy.

Q. Well, of course, isn't this true, Mr. Biehler: That you can not say that you know unless you ask every customer on their order as to whether or not the public was consuming these particular brands?

A. Well, I can say that we did not make any near beer from "Derby" and "Derby" is ale, and that part of the business was lost.

Q. Well, we have that, but to go back to the beer, that you could not state positively unless you had a system whereby you asked every customer as to every item of sale and kept track of it and had a competent auditor to check it up?

A. I answered that in the manner that I did because sales gradually decreased instead of increased.

Q. And that is the result merely of a general analysis?

A. And naturally one would be inclined to think that the word or words didn't help, because our sales had decreased.

292 Q. You are giving the result of a general analysis; that is what you are doing, isn't it?

A. What is that?

Q. You are giving a general analysis of your net income here as based upon the trade rather than upon the separate brands?

A. No. I know that we have not used any ale to make near beer from, and I know that part of the business is entirely lost, and as far as "Congress" was concerned I know that our sales have decreased. So, I can not see in any manner where their use in any manner helped the sale of the near beer.

Q. You never tried to make what is known as ginger ale similar to Canada Dry, or otherwise?

A. Yes; we made ginger ale.

Q. What brand did you sell it under, the ginger ale?

A. We discontinued the manufacture of it, but we did make it for a while.

Q. You put out no particular brand?

A. No; we had ginger ale; only had ginger ale.

By Mr. TOOMEY:

Q. The Haberle Beverage and Products Company is still engaged to-day in the manufacture of cereal beverages?

A. Yes, sir.

Q. Notwithstanding the fact that you say you sustained a loss?

A. Yes, sir.

Mr. TOOMEY. That is all.

Mr. WELCH. That is all. I will recall Mr. Siebeneichen.

293 CARL W. SIEBENEICHEN, called as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Siebeneichen, have you got the return there for 1919, Exhibit 12?

A. No; I have not.

Q. Will you pick it out from the exhibits?
A. The return for 1919?
Q. Yes.
A. There is no return for 1919 in here.
Mr. WELCH. Isn't that in evidence?
Mr. TOOMEY. Yes; I think it is.
The WITNESS. Here is a photostatic copy of the return for the year 1919.
Mr. WELCH. Now, let me see that, if you will.

By Mr. WELCH:

Q. That is plaintiff's Exhibit 1?
A. Yes. Exhibit 12 is not a return. It is a computation I made.
Q. Now, have you got there the claim for refund?
A. Claim for refund?
Q. Yes.
A. Yes. That is attached to the photostatic copy of the return.
Q. There is something I would like to get on the record here. Now, Mr. Witness, in computing this claim for refund in evidence here and arriving at the good will, and so forth, what period did you spread that over? I think your statement shows it, but I don't think the record does show it—that is, the evidence. Now, tell
294 us something about how you got at that and what does your exhibits in evidence show, so as to get it on the record?
A. Well, in distributing the value of the good will I followed the ruling of the Treasury Department which required that any loss through obsolescence of good will be spread over a period commencing January 31st, 1918, and ending January 16th, 1920; in other words, to spread the entire amount over a period of 715 days. Due to the fact that the Haberle Crystal Springs Brewing Company reported on a fiscal year basis, the portion of the good will applicable to the year 1918 would have been 120/715ths and the portion applicable to the year 1919 would have been 365/715ths.
Q. And that is the way you figured the period in the return?
A. And that is the way I treated and applied the loss of good will over the period.
Q. For the period 1919?
A. 1918 and 1919.
Q. Upon this reported period from June first, 1918——
A. (Interrupting.) From June first, 1918, to May thirty-first, 1919.
Q. Now, the company's return and the claim for refund, that is in evidence.
Mr. WELCH. Now, there is a question here about the interest. The claim for refund, your honor, as appears here in the record, was

$15,530.92, for the year 1919. Now, that is what we are seeking to recover here in this action. Now, when that was paid there is $1,209.83 that was interest and penalties. Now, that covered
295 the amount paid, so that we are going to try to agree on the amount which was applicable and paid on the $15,530.92.

The REFEREE. That is, the interest?

Mr. WELCH. Interest and penalty.

Mr. TOOMEY. There was no penalty. It is interest, whatever it was.

Mr. WELCH. Whatever it was applied to.

The REFEREE. How can you tell that it was interest or penalty?

Mr. WELCH. Well, their record over there shows it.

The REFEREE. It is conceded that that is the amount of interest and penalties or interest as the case may be?

Mr. TOOMEY. But Mr. Welch's point is this: I don't know whether he just made that clear, but for the sake of the record I will just state this, if you have no objection—for the year 1919 there was an assessment of $17,283.30, upon which interest in the sum of $1,209.83 was paid; $17,283.30 was the additional assessment which arose by reason of the disallowance of certain depreciation on outside real estate. Plaintiff's claim for refund having been based upon their contention that they should have been allowed obsolescence for good will necessitated a recomputation showing an amount alleged to be due of $15,530.92. The $1,209.83 interest having been computed on the $17,283.30 assessment, it now becomes necessary to deter-
296 mine what amount of the $1,209.83 would be applicable to the $15,530.92. I think that is correct.

Mr. WELCH. I think that is right; yes. And you will try to give us those figures after dinner?

Mr. TOOMEY. We will have them here after lunch.

The REFEREE. All right.

By Mr. WELCH:

Q. Now, how you computed it, that is on your statement in evidence here, is it not, Mr. Witness?

A. That is the statement I just made, and how it was computed at the time that the claim for refund was made is included in the schedules attached to the claim for refund.

Mr. WELCH. I think that is all.

Cross-examination by Mr. TOOMEY:

Q. Now, the manner in which you computed the value of this good will as of March first, 1913, as shown by the claim for refund, is wholly different from the manner in which you have computed it in this action?

A. Is what?

Q. Wholly different from the manner or method used by you in valuing the good will as of March first, 1913, for the purpose of this action?

A. Is different?

Q. Yes.

A. Only as to the rate used.

Q. In your claim for refund you took an allowance of some twelve per cent, I believe, on the capital stock of eight hundred thousand dollars?

297 A. On the capital stock of eight hundred thousand dollars; correct.

Q. Instead of taking a rate of return upon the entire net worth of the corporation's tangible assets?

A. The average net worth.

Q. Yes.

Mr. TOOMEY. The questions I am going to ask the witness at this time will be in the nature of further cross-examination of his testimony on the previous hearings, and I think there will be no objection to that.

Mr. WELCH. No.

By Mr. TOOMEY:

Q. Have you with you, Mr. Siebeneichen, the computations of good will which you dictated into the record at your prior testimony?

A. I believe they are in the exhibit.

Mr. TOOMEY. I don't believe you introduced this exhibit. I think he read it in.

Mr. WELCH. If it is not in evidence, we offer it in evidence now.

Mr. TOOMEY. Yes; it is in evidence.

By Mr. TOOMEY:

Q. In taking the average net tangible assets of this company, you took the net tangible assets for the end of each of the five years preceding, did you not?

A. Yes, sir; that is, for the five full accounting periods preceding March first, 1913.

Q. Now, would it not have been better and more accurate to have taken the net value of the tangible assets for the beginning of

298 each of the years instead of the ends of the years, in order to clearly reflect the net earnings at the end of the year; do you get what I mean?

A. If we did that we would show a great return; that is, in other words, we would have a greater excess to capitalize for the reason that at the beginning of the year our investment would be less by the amount of the income added to it during the year.

Q. Have you the valuation of the tangible assets of this corporation as of the fiscal year ending May 31st, 1907?

A. That is included in Exhibit 10 in evidence.

Q. What is it?

A. $1,397,121.36.

Q. Now, have you ever made a computation of the value of the good will of this company as of March first, 1913, using the same basic figures which you have here, using a ten per cent rate?

A. I have not; no.

Q. At an eight per cent rate?

A. No.

Q. Now, I am going to give you a scratch pad, and it is just a matter of computation and won't take over ten minutes, and I am going to ask you to take the same figures which you have here, using the same basic figures, average tangible assets, average earnings, and compute a good will valuation, using a ten per cent return on tangibles capitalized at 20 per cent?

A. It is not necessary to make a computation for that, Mr. Toomey.

Q. What would be your answer?

A. There would not be any good will value.

Q. At eight per cent?

A. There would not be any at eight per cent. I can explain the reason for that answer, if you want me to.

299 Q. Well, I know your answer is correct, and I don't think we need go into that.

Mr. TOOMEY. I would like to have this paper marked "Government's Exhibit No. 3," for identification.

(Paper marked "Defendant's Exhibit Number 3," of this date, for identification.)

By Mr. TOOMEY:

Q. I hand you a computation, using exactly the same basic figures which you have used in your Exhibit Number 12, except that the average net worth of tangible assets is taken as of the beginning of each of the five preceding fiscal years prior to 1913 instead of the average net worth of tangible assets as of the end of those respective years as taken by you in Exhibit 12, in which there has been allowed a return on the average tangible assets of ten per cent, eight per cent, and six per cent, respectively, capitalized at twenty per cent, and I ask you if that is a correct computation?

A. It is.

Mr. TOOMEY. I will introduce in evidence defendant's Exhibit Number 3, for identification.

Mr. WELCH. May I see it?

(Same handed to and examined by Mr. Welch.)

Mr. WELCH. What is your question?

The WITNESS. Whether the computation is correct.

300 Mr. WELCH. A correct computation on the basis used?

The WITNESS. Yes.

Mr. TOOMEY. Yes; on the basis used. We introduce this in evidence.

The REFEREE. Received.

(Computation received in evidence and marked "Defendant's Exhibit No. 3," of this date, and is as follows:)

Defendant's Exhibit 3

As at—	Net worth	Net income	For fiscal year ending
5/31/07	$1,397,121.36	$112,371.11	5/31/08
5/31/08	1,461,492.47	110,803.81	5/31/09
5/31/09	1,523,706.08	122,998.19	5/31/10
5/31/10	1,552,324.44	130,831.39	5/31/11
5/31/11	1,619,155.83	100,664.37	5/31/12
	5)7,553,800.18	5)577,668.87	
Average net worth	1,510,760.04		
Average net income		115,533.77	

First computation:	
Average earnings for 5-year period	$115,533.77
Earnings attributable to tangible assets, 10% of $1,510,760.04	151,076.00
Remainder of earnings attributable to good will	None.
Value of good will as at March 1, 1913	None.
301 Second computation:	
Average earnings for 5-year period	$115,533.77
Earnings attributable to tangible assets, 8% of $1,510,760.04	120,880.80
Remainder of earnings attributable to good will	None.
Value of good will as at March 1, 1913	None.
Third computation:	
Average earnings for 5-year period	115,533.77
Earnings attributable to tangible assets, 6% of $1,510,760.04	90,645.60
Remainder of earnings attributable to good will	24,888.17
Capitalized at 20%	5
Good will value as at March 1, 1913	124,440.85

By Mr. TOOMEY:

Q. In the computations made and introduced in evidence at the prior hearing you followed the method prescribed by the Government in the Committee on Appeals and Reviews Memorandum Number 34, except as to the rates used?

A. In everything, excepting as to the rates used.

Q. The first computation appearing on this Exhibit Number 3, which you have testified is correct, is, therefore, based upon the regulation?

A. The regulation, the same method that I have used in my computation.

302 Q. With the exception of the rates?

A. With the exception of the rates.

Q. Now, as to the spread of the good will which you allege to be shown over the obsolescence periods from January 31st, 1918, to January 16th, 1920, did you follow the method provided in the Tax Department Memorandum 34?

A. I did.

Q. It is your understanding that that is the manner in which it should be spread, if at all?

A. My understanding is that the obsolescence, if any, must be spread over a period of seven hundred and fifteen days, which would be the time expiring from January 31st, 1918, to and including January 16th, 1920.

Q. The department uses a monthly basis instead of days, I believe, do they not?

A. I would say that the days would be more accurate.

Q. It would not make much difference?

A. It would not make very much, no; no appreciable difference.

Mr. TOOMEY. That is all.

Redirect examination by Mr. WELCH:

Q. Witness, in regard to this Exhibit Three, defendant's Exhibit Number 3, you said something as to the average earnings for a five-year period attributable to tangible assets; you took that at the end of the year or the first of the year?

A. My computations were based on the net worth at the close of the year.

303 Q. Prior to 1913?

A. Those are the five full accounting periods prior to March first, 1913.

Q. But, if you took it at the beginning of the year, as taken here, it would be more favorable to us, would it not, in your computation?

A. Slightly.

Q. Now, in regard to this exhibit, defendant's Exhibit Number Three, you say the computation is correct, based upon the figures that they took; in other words, taking it as they have it here as five years, remainder of earnings attributable to good will, capitalized at twenty per cent and multiplied by five, now that, taken for a longer term, would make a greater result, wouldn't it?

A. As capitalized at a ten-year purchase would make quite a difference.

Q. That would make a big difference in our favor?

A. In our favor; yes, sir.

Q. And it is up here to be determined just what is the right and reasonable and fair rule for the court to adopt?

A. I would say that is correct.

Mr. WELCH. I think that is all.

304 DISCUSSION AS TO EXHIBITS AND TESTIMONY

Colloquy between court and counsel

Now, for the record. If the court please, on page 248 of the printed record, I evidently misspoke myself when I said I offer in evidence all these licenses, and you will concede that we simply took Exhibit 16. Now, that should be corrected to mean that I offer in evidence all those powers of attorney and assignments of liquor tax certificates. Now, that may be corrected, may it not?

Now, then, there is in evidence here, as I understand it, 130 of those powers of attorney over liquor tax certificates in 1913, and in 1918, I believe, 131.

The REFEREE. And there is a list of them?

Mr. WELCH. And there is a list of them.

The REFEREE. And that list is in evidence?

Mr. WELCH. And that list is in evidence.

The REFEREE. And that simply means that all of the powers of attorney that are on that list are in evidence subject to your objection?

Mr. BURDEN. Yes.

Mr. WELCH. These two lists?

Mr. BURDEN. Yes.

Mr. WELCH. The one in 1913 and the one in 1918.

Mr. BURDEN. And if there is any question about that, maybe you better offer them.

305 Mr. WELCH. I think it is covered. Now, have you got that stipulation there, Mr. Burden?

Mr. BURDEN. I will look and see. I have a proposed stipulation. (Same produced.)

Mr. WELCH. I think it is already in the stipulation on the record that all the State laws of the State of New York are before the court and the same as though they are in evidence for the purpose of referring to them and considering them, and also that the T. B. R. reports, the court may refer to them.

Now, I would like to have go on the record that the national prohibition amendment was adopted by the Senate by a vote of 65 to 20 on August first, 1917, and on December 17th it was adopted by the House, with slight changes, by a vote of 282 to 128.

Mr. BURDEN. Well, our position on this matter, as I told Mr. Welch the other day, if the court please, is this: The court will take judicial notice of everything that is authentic of this being duly enacted into law, or the regulations, but it has been impossible to get the Treasury Department to concede the stipulation as Mr. Welch wants us to, for the reason that we do not desire to inject into this case any possible constitutional question. The case is being tried upon a very close theory that the Government is right with reference to the points discussed here, and we do not desire to have them get up in
306 the Supreme Court of the United States with some constitutional questions by our stipulation.

Mr. WELCH. This is a fact.

Mr. BURDEN. And that is the reason we are not more agreeable.

Mr. WELCH. All we want are these facts.

The REFEREE. The only purpose is to show that the constitutional amendment was adopted on a certain day, and why stipulate it?

Mr. BURDEN. The United States Supreme Court has passed on it.

Mr. WELCH. They can stipulate that.

Mr. TOOMEY. May I go a little bit further. We do not want to be antagonistic here at all, if the court please. The usefulness of this proposed stipulation was demonstrated by the testimony of their expert a little while ago, in which it was agreed that the obsolescence period, if they are entitled to obsolescence as a matter of law, that they have got to show good-will value and all the other preliminary things favorable to them, that the obsolescence period, as to the spread, it may be made between certain dates. Now, they have accepted that, and it is agreeable to both sides. Now, why does not that close the situation so far as going into the history of all these votes and everything pertaining to it which lead up to the enactment of prohibition on a certain date? I can not see the slightest
307 materiality of going into these things, and it is a fact that the Government frequently finds out to its sorrow on appeal that they should not have stipulated in regard to things concerning which they have not had the time to check up and concerning which they can not see the materiality of the evidence.

Mr. WELCH. Those are things I can prove. I am only asking the fact. Now, the facts that I am going to ask you to stipulate are simply these things that I can prove and that I claim are pertinent in this case and proper here and should be before the court. Now, those things I want to prove. If you don't want to admit them, I shall have to ask for an adjournment. I am asking you to admit

such facts. I can prove the facts as to when the different States ratified this amendment and so on. I am not going to ask you to stipulate anything that I can not prove. If you do not want to stipulate them, I will ask for time and adjourn it so I can prove them. I am talking about facts which are a matter of record and which you can concede, and I am willing to put them in so you can check them all up, subject to correction.

Mr. BURDEN. Well, they will go in under our objection.

Mr. WELCH. You can object to them going in. I don't care about that, but the fact that so and so took place when each State ratified the amendment, I certainly want in there, and I am going to
308 make an effort to get them in. The fact of them being material or immaterial or otherwise, you can obect to them, if you will concede the fact and object to the fact of their being material, or any other objections you want. It simply means, if you don't, that you are going to put me to the bother of getting the records for the different States and producing them here. That is all.

I don't want it understood, if the court please, by my silence, that any action or decision or ruling of the Treasury Department is going to be binding on the court in any way, or binding on us. We are here. There are no cases I know of that the courts have ever ruled on those questions, and I don't want it understood that I am conceding anything or conceding in any manner that any decision of the Treasury Department in any way binds us on our claim here.

The REFEREE. I presume that is for me to determine.

Mr. TOOMEY. That does not enter into this particular stipulation, I take it.

The REFEREE. Well, if he desires to prove it, if you do not stipulate it, I certainly cannot rule on its competency or admissibility until it is offered before me, can I? So, that is about all I can say on it at this time, at least.

Is there anything else in the stipulation on which you can agree?

309 Now, on page 44 of the record you will find something in regard to T. B. R. 44.

Mr. WELCH. And T. B. R. 44; that is before the court and the court may refer to it by the stipulation.

Mr. TOOMEY. Practically everything in that stipulation is before the court.

The REFEREE. Is that before the court—that T. B. R. 44?

Mr. TOOMEY. We have agreed that the court can take judicial notice and consider in this case these official rulings of the department, regulations, and so forth, which are officially published in the official publications of the department.

The REFEREE. Now, that is not in here, is it? You did stipulate that?

Mr. TOOMEY. I thought that was stipulated into the record before.

Mr. WELCH. Yes; I think that is in the record, not that they are binding, but the court may refer to them.

Mr. TOOMEY. We don't contend they are.

The REFEREE. I understand that the court is to determine whether or not they do have any bearing in this case, and, if so, what the bearing is?

Mr. WELCH. Yes.

The REFEREE. And the court thoroughly understands that.

310 Mr. WELCH. The only fact of the thing that is left I think, it seems to me, for the record that I care about now is simply the date of the adoption of the eighteenth amendment and when each State ratified it. Those are facts that I can prove by records.

Mr. TOOMEY. What would be the purpose of such testimony?

Mr. WELCH. The purpose is to have before the court the very questions here.

Mr. TOOMEY. That is indefinite. This is off the record.

(Discussion outside the record which the stenographer was directed not to take.)

Mr. WELCH. Well, what agreement is there, do you claim?

Mr. TOOMEY. Assuming these preliminaries that, as a matter of law, there is any such thing as obsolescence of good will, further assuming, as a matter of law that they have proven a good will as of March first, 1913, which has a provable value, and assuming also the further fact that such good will was rendered obsolete by prohibition, I understand that we are in agreement to the effect that that valuation may be spread over the period from January 31st, 1918, to January 16th, 1920. Now, what more could you want?

311 Mr. WELCH. We are not in agreement in that regard and that, and that is the way we did it, and backing that up, the way we did it, I want to know when that amendment was adopted and when the different States ratified it. It is important here that it is in.

The REFEREE. Is it not important on the question of whether or not there was obsolescence? You do not agree that there was obsolescence, of course. That is a question for me. It is not important on the question as to what years it should be spread over, but as to whether or not there was any, in fact, obsolescence of good will. Now, wouldn't that be of some value?

Mr. TOOMEY. There is no dispute that prohibition prohibited certain things.

Mr. WELCH. We have nothing on the record here at all and I propose to get it on the record.

Mr. TOOMEY. Well, you have got to adjourn until this afternoon, haven't you, and come back at two o'clock?

(Discussion outside the record which the stenographer was directed not to take.)

The REFEREE. If you want to offer proof on that, you will have to have the case adjourned after to-day.

Mr. WELCH. Yes.

The REFEREE. If he wants to offer proof, he is entitled to that.

312 Mr. BURDEN. We take the position, because of the attitudes of our departments, we cannot do this. Now, we might want to rebut some of it, you see.

Mr. WELCH. Can't change the record.

Mr. BURDEN. I will be frank about it. We might want to rebut some of this. The Supreme Court has passed on some of these questions, but he might have one or two here that have not been passed on and, if that is so, we might want to rebut it.

Now, let us adjourn until two o'clock and see what we can decide to do about it. Now, what are the probabilities, will you go on to-morrow? You insist on putting this in?

Mr. WELCH. Absolutely.

Mr. BURDEN. Then we have got to come up again.

The REFEREE. Off the record.

(Further discussion outside the record which the stenographer was directed not to take.)

Mr. TOOMEY. What means have you of making it easy to check them up?

Mr. WELCH. Why, every State has certified in Washington.

Mr. TOOMEY. We haven't got that here?

Mr. WELCH. No; but they have it in Washington. Every State certified when each State ratified that amendment, ratified it to Washington.

313 Mr. BURDEN. You must have the record from which you drew up this stipulation. Have you a printed record of the Supreme Court of the United States decision?

Mr. WELCH. No; I haven't. You have the State laws of each State in the library and you can check that up. Have we got all the State laws here?

The REFEREE. Yes; in the library. That is quite a job, and it would be much easier, I should think, to check it up in Washington.

Mr. BURDEN. There is something about it that my department will not stipulate it.

Mr. TOOMEY. I don't want to be put in the position of being officious in the matter.

Mr. BURDEN. We will have a conference and see how far we can get with it.

The REFEREE. Then you will take it up and decide during the adjournment?

Mr. BURDEN. Yes.

The REFEREE. We will now adjourn until two-fifteen o'clock this afternoon.

(At 12.43 p. m. adjournment taken until 2.15 p. m., same date and place.)

Afternoon session, Syracuse, New York, Tuesday, August 25, 1925, 2.15 p. m.

Presiding: Honorable James J. Barret, referee.

Appearances: Same as before.

314 Mr. WELCH. It is stipulated that the court may take judicial notice of all acts of Congress.

The REFEREE. What is that?

Mr. WELCH. It is stipulated that this court may consider and take judicial notice of all acts of Congress and all proclamations of the President of the United States which have reference to prohibition or the manufacture, sale, import, or export of intoxicating liquors, applicable in this case.

Mr. TOOMEY. All right.

Mr. BURDEN. For the purpose of expediting the trial of the case the defendant, with certain limitations, is willing that the plaintiff should read into the record certain parts of his proposed stipulation, to be agreed upon now, but with the reservation that if any of it is found to be incorrect as to items or dates or otherwise the defendant shall have the right to serve a ten days' notice and to have a rehearing or a further hearing.

Mr. WELCH. Make it a five days' notice.

Mr. BURDEN. Or five days' notice, and have a further hearing before the special master for the purpose of rebutting any of those parts of the stipulation which are found to be incorrect.

The REFEREE. I suppose you mean rebut or correct?

Mr. BURDEN. Yes. It is further stipulated in open court
315 that no further reopening of the case shall be had, other than to rebut or correct the stipulation, if it be necessary by the defendant.

The REFEREE. Except by consent?

Mr. BURDEN. Yes; except by consent.

Mr. WELCH. That is, so far as any reopening is concerned?

Mr. BURDEN. Yes.

Mr. WELCH. Now, suppose we read this into the record:

"It is stipulated upon the trial of this action that the national prohibition amendment was adopted by the Senate by a vote of 65 to 20 on August 1, 1917, and on December 17th, it was adopted in the House with slight changes, by a vote of 282 to 128. These slight differences were adjusted and the amendment was finally adopted by both Houses on December 18th, 1917.

During the year 1918, seventeen States were in session prior to June 1st. Of these seventeen, the following twelve ratified, with the following votes:

	Senate	House
Missouri (Jan 8)	28—5	93—3
Virginia (Jan. 10)	30—8	84—13
Kentucky (Jan. 14)	28—6	66—10
South Carolina (Jan. 18)	28—6	66—29
North Dakota (Jan. 25)	43—2	96—10
Maryland (Feb. 13)	18—7	58—36
Montana (Feb. 19)	35—2	77—6
316 Texas (Feb. 28)	15—7	72—30
Delaware (Mar. 18)	13—3	27—4
South Dakota (Mar. 19)	43—0	86—0
Massachusetts (Apr. 2)	27—12	145—91
Arizona (May 23)	Unanimous	29—3

During the latter part of 1918, the following three States adopted the amendment by the following votes:

Georgia (June 26)	34—2	129—24
Louisiana (Aug. 6)	21—20	69—41
Florida (Nov. 27)	25—2	61—3

During the year 1919, in two weeks from January 2nd to January 16th, twenty-one States ratified by similar votes and on this latter date, thirty-six States had ratified it and the amendment became a part of the Constitution. Within a short time thereafter, nine more States ratified, making a total of forty-five States out of forty-eight."

Mr. BURDEN. Now, it is understood that this stipulation is made subject to the general objection and all special objections that we have made, that it is immaterial and irrelevant to the issues involved in the pleadings and in the case.

The REFEREE. Objection overruled. Same ruling as before and an exception to the Government.

Mr. BURDEN. And an exception to the Government, and that is the understanding as I take it?

317 The REFEREE. Yes.

Mr. WELCH. If the court please, I would like to put on the record in regard to interest on our claim here that we are seeking to recover this statement: That the amount of interest that we are entitled to recover which is indicated in the return on the claim for

refund as interest and penalties is six per cent of the amount of our recovery for one year and two months, being from March 29th, 1921, to June 12th, 1922. Now, then, from that time on, of course, we would be entitled to our interest. Now, from the time we paid this money, we are entitled to interest on that and we get that much in addition.

The REFEREE. Off the record.

(Discussion outside the record which the stenographer was directed not to take.)

The REFEREE. That is conceded, is it not, upon any recovery by the plaintiff there is that to be figured in?

Mr. WELCH. That is the interest up to the time we made our payment.

The REFEREE. Up to the time you made your payment?

Mr. WELCH. Yes; the interest and penalties referred to.

Mr. TOOMEY. Yes.

Mr. WELCH. I will recall Mr. Biehler.

318 FRANK C. BIEHLER, recalled as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. WELCH:

Q. I show you Exhibit 10, in evidence, being balance sheets for 1907 to May 31st, 1913, in which bills receivable are mentioned; now, what did those bills receivable consist of; what were they?

Mr. BURDEN. I object to that on the ground that it shows for itself.

Mr. WELCH. Whether they were notes, or what, or securities, and, if so, what security?

Mr. BURDEN. We want the general objection and the special objection that it is immaterial and they show for themselves, if anything, as far as the evidence is concerned.

Mr. TOOMEY. What page are you referring to?

Mr. WELCH. I am referring to May 31st, 1913. Now, in these items here where it says bills receivable, what are those bills receivable; what were they?

Mr. BURDEN. Objected to upon the general grounds and the special grounds that no proper foundation has been laid for the question and it is calling for a conclusion of the witness.

Mr. WELCH. Of what did those bills receivable consist, in order words?

Mr. BARRETT. That is in evidence?

319 Mr. WELCH. Yes; but it does not state whether secured or unsecured or what it is.

The REFEREE. You do not object to it on the ground that it is not the best evidence?

Mr. BURDEN. I don't know.

Mr. WELCH. Those were notes secured by mortgages and I want to show that. That is all.

The REFEREE. Well, I will receive it and give the Government an exception.

The WITNESS. Why, in those days we carried——

By Mr. WELCH:

Q. (Interrupting.) Just what were they?

A. They represented real-estate mortgages mostly; chattel mortgages. They were notes that were supported by real-estate mortgages and chattel mortgages.

Q. In other words notes secured by real-estate mortgages?

A. Yes, sir; we carried no mortgage receivable account; it was all represented in our bills receivable account.

Mr. WELCH. That is all of that.

Now, if the court please, that is our case, with this exception: There are some witnesses, I just as soon state what I want to prove and what we are going to prove by them; that is, that five or six per cent is a reasonable return and that from six and a half to ten years is a reasonable time. Now, those two things, I am not ready to go on with them, but I am willing the other side should go on, and they could put in their evidence upon that question, and I can put mine in tomorrow.

Mr. BURDEN. Where are your witnesses?

Mr. WELCH. I cannot get them. I think I will be able to get them tomorrow. One of them will return tomorrow. We are tied up on them at present.

(Further discussion outside the record which the stenographer was directed not to take.)

Mr. BURDEN. The defense prefers not to proceed in the case until you rest finally.

The REFEREE. You have no objection to an adjournment until he obtains his witnesses?

Mr. BURDEN. No.

The REFEREE. We will take an adjournment until ten o'clock tomorrow morning.

(Matter adjourned until Wednesday morning, August 26, 1925, at ten o'clock, same place.)

321 Morning session, Syracuse, New York, Wednesday, August 26, 1925, 10.00 a. m.

Presiding: Honorable James J. Barrett, referee.

Appearances: (Same as before.)

MORRIS F. TANNER, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Tanner, you reside in Syracuse?
A. I do.
Q. And have for about how many years last past?
A. Twenty-five.
Q. And what is your business, Mr. Tanner?
A. You classify me, I think, as an investment broker.
Q. And you handle stocks and bonds?
A. Yes, sir.
Q. And such stuff?
A. Yes, sir.
Q. And how long have you been in that business?
A. Oh, eighteen to twenty years.
Q. Here in Syracuse?
A. In Syracuse; yes.
Q. And you were in that business in 1913?
A. Yes.
Q. And are familiar with the market value of industrial securities?
A. I think so; to a limited extent, at least.
322 Q. And you were in 1913?
A. Yes, sir.
Q. And prior to 1913?
A. Yes, sir.
Q. Now, in your consideration of a fair market value of securities of industrial corporations, do you take into consideration the character of the various classes of assets and the ordinary yield on investment in such assets, as well as the general nature of the business, its location, management, financial backing, and so forth?
A. Yes, sir.
Q. You say you do?
A. Yes, sir.
Q. In other words, in arriving at the necessary yield on securities to an investor you arrive at a composite rate by considering the security and the necessary yield on the various classes of assets?
A. Yes, sir.
Q. You say you do?
A. Yes, sir.

Q. Now, I show you statement of assets and liabilities of the Haberle Crystal Springs Brewing Company as of May 31st, 1913, as presented in evidence in this proceeding, being the nearest date in point of time to March first, 1913, on which the books of said company were closed. Upon the basis of the figures of various classes of investment shown in that statement, taking into consideration the nature of the business and your general knowledge of the history of this business, what would you say would be the necessary yield to an investor in the securities of that company on or about March first, 1913? You have examined this statement, have you not?

323 Mr. BURDEN. We take the general objection interposed to this class of testimony, that it is incompetent, irrelevant, and immaterial, and the special objection that no proper foundation has been laid for the question.

Mr. TOOMEY. And I think we should make the further objection that the witness is not qualified to testify as to return on investment in business of this particular character.

Mr. REFEREE. I think there is some force to that last ground of objection.

Mr. WELCH. I will qualify him a little more.

By Mr. WELCH:

Q. Now, in that statement are bills receivable and from the evidence it appears that those were notes secured by mortgages. Now, you know something, or you knew something about the Haberle Crystal Springs Brewing Company and its officers, did you?

A. Quite a little.

Q. And you know the president, Frank B. Haberle?

A. Yes, sir; I did.

Q. For many years?

A. I did.

Q. And he had been in the brewing business since he was a boy, practically, and as long as you knew him?

A. As long as I knew him.

Q. And Mr. E. C. Hall, did you know him?

A. Very well, indeed.

Q. And he was the general manager of the company?

A. Yes, sir.

Q. And had been for years, as long as you knew him?

A. Yes, sir.

324 Q. And you knew Mr. Swartz, the vice president and treasurer?

A. Yes, sir.

Q. He was the treasurer, wasn't he, in 1913? Well, you knew Mr. Swartz, who was one of the officers of the company?

A. Yes, sir; and Mr. Oswald, secretary. I knew them all very well.

Q. Now, you were familiar with its stock and assets?

A. I was not so familiar with the assets at that time of the business, but I was familiar with the stock.

Q. You bought and sold it?

A. I owned stock in the brewery at various times.

Q. And you were familiar in a general way with its business?

A. Yes, sir.

Q. And did you know the value of the stock from time to time?

A. Yes.

Mr. WELCH. I think the witness is qualified.

Mr. BURDEN. We renew the objection.

Mr. REFEREE. Did you ever deal in the securities of this company?

The WITNESS. Buying or selling them securities?

The REFEREE. Yes.

The WITNESS. No, sir.

The REFEREE. Buying or selling their securities?

The WITNESS. Their stock?

The REFEREE. Yes.

The WITNESS. Oh, yes.

The REFEREE. And did you know the market prices of the stock?

325 The WITNESS. Do I now know?

The REFEREE. Did you?

The WITNESS. At those dates?

The REFEREE. Yes.

The WITNESS. I don't buy or sell blindly.

Mr. TOOMEY. Did you sell any of the securities of this company on the open market?

The WITNESS. What do you mean by the "open market"? There never was an open market. You had to find your purchasers and your sellers. It was not a listed stock and, in fact, there is no curb here or anything of that kind. A man that had stock for sale, well I handled these securities, as I have various kinds at various times, bank stocks and local securities, that is only what I handle and this would come under that class.

Mr. TOOMEY. And what was the extent of your dealings in the stock of this company; was it merely the transferring or the buying of your own personal holdings in this company, or did you place investments in this company's stock with third persons; did you negotiate such sales?

The WITNESS. I would buy these stocks on a speculation; if any was offered me at a price that I thought was attractive I would buy it

and then resell it, and sometimes I would hold it quite a period and other times not so long.

Mr. TOOMEY. When were these transactions?

326 The WITNESS. I could not tell you the exact date or dates.

Mr. TOOMEY. You don't know whether that was on March first, 1913, or five years prior or five years later?

The WITNESS. In fact, I could not say right positively that I owned stock in 1913. I would not say so.

Mr. TOOMEY. Did you deal generally in the securities of other liquor companies?

The WITNESS. I think it was confined to one more, the Ryan brewery from time to time, I dealt in that in the same way; Mr. Thomas Ryan.

Mr. TOOMEY. And do you know when that was?

The WITNESS. No; I could not tell you the exact year.

The REFEREE. When did you begin to deal in those securities, about when?

The WITNESS. Why, I will say between 1910 and 1920. I am not good as to dates in this connection. I can just think the matter over since I came here and what I was interested in.

The REFEREE. You mean by that you began in 1910 and ended in 1920, or began sometime in that period.

The WITNESS. Yes.

The REFEREE. Which is it?

The WITNESS. I would say I began dealing in the securities in 1910.

327 The REFEREE. Now, what was the question?

By Mr. WELCH:

I show you statement of assets and liabilities of the Haberle Crystal Spring Brewing Company as of May 31st, 1913, as presented in evidence in this proceeding, being the nearest date in point of time to March first, 1913, on which the books of said company were closed. Upon the basis of the figures of the various classes of investment shown in that statement, taking into consideration the nature of the business and your general knowledge of the history of this business, what would you say would be the necessary yield to an investor in the securities of that company on or about March first, 1913?

Mr. TOOMEY. We renew our special objection, that the witness is not qualified and not competent to testify.

The REFEREE. I will receive. Objection overruled and an exception to the Government.

Mr. TOOMEY. Yes; an exception to the Government.

By Mr. WELCH:

Q. What would you say, Mr. Tanner?

A. Why, I should say five to six per cent.

Q. Is your estimate based upon experience in the selling of securities of industrial corporations in the year 1913 to individual and corporate investors?

A. Yes.

328 Mr. BURDEN. And we have the same objection to all this testimony?

The REFEREE. Yes; and the same ruling.

Mr. BURDEN. And an exception.

By Mr. WELCH:

Q. By a separation and inspection of the various classes of investments shown in the balance sheet you have before you, what would you estimate would be the necessary return on securities representing the investment in Syracuse real estate and real-estate mortgages in 1913?

A. Why, I should say four to five per cent; five per cent, possibly.

Q. And on the other general investments and assets used in the manufacture and sale of beer, ale, and lager, what would you say?

A. Well, it would require, I should think, a better return; six or seven per cent.

Q. So that your estimate of five to six per cent represents a composite rate, taking into consideration all of the factors usually presented to and considered by well-informed investors?

A. Yes, sir.

Q. Now, after provision for a normal return upon net tangible assets, in accordance with your testimony, what yield would have been necessary in the year 1913 to sell securities of a corporation such as the Haberle Crystal Springs Brewing Company at par, backed only by the expectancy of earnings in excess of an amount necessary for such normal return?

A. I wish you would read that question again. That is so long.

329 Q. Now, I will read it again and put it this way: Now, after provision for a normal return upon net tangible assets, in accordance with your testimony, what yield would have been necessary in the year 1913 to sell securities of a corporation such as the Haberle Crystal Springs Brewing Company at par, backed only by the expectancy of earnings in excess of an amount necessary for such normal return on net tangible assets?

Mr. TOOMEY. We object to the form of the question. It is not intelligible to me. I don't know whether it is to the witness or not.

The WITNESS. It is not. I really do not get the point of it.

Mr. WELCH. Let me put it this way:

By Mr. WELCH:

Q. In other words, such securities would have sold at par upon the expectancy of a return in how many years?

Mr. BURDEN. And, in addition to the general objection, we want the special objection interposed heretofore that it calls for an operation of the mind of the witness rather than a calculation based upon some foundation which does not appear, and no foundation laid for the question so that it would be intelligible to the court in deciding the case, or upon any comparison whatever of evidence.

The REFEREE. I think that is true. Read it again.

(Question repeated.)

330 The REFEREE. I think that is speculative; isn't it, Mr. Welch?

Mr. WELCH. Oh, no. They use five years.

The REFEREE. What?

Mr. WELCH. On their figures here, they used five years.

The REFEREE. You mean you are asking, upon that return, when these stocks would have sold at par?

Mr. WELCH. No. What would be the expectancy, in other words, to get the money back?

The REFEREE. How is it important?

Mr. WELCH. Oh, as to time, show the value of the intangibles. That is what we figure here. We are going to contend, for instance, that ten years is a reasonable time, and they have used five years, and if you use a shorter time you wouldn't get any intangibles at all.

The REFEREE. I will take it and permit you to make a motion to strike it out and reserve decision on the motion to strike out and give you an exception.

Mr. BURDEN. Yes.

By Mr. WELCH:

Q. What would you say?

A. Well, in those days, that question did not arise so often as it has of late years.

Q. I mean, what would you say it would be at that time; what is your answer?

A. Why, ten years or more.

331 Q. And for that ten years it would figure, then, ten per cent; wouldn't it?

A. Yes, sir.

Q. On the first question I asked you?

A. Yes, sir.

Mr. WELCH. You may cross-examine.

Mr. TOOMEY. What were you referring to—the balance sheet of May 31st, 1913?

Mr. WELCH. Yes.

Cross-examination by Mr. TOOMEY:

Q. I will refer to the balance sheet for the fiscal year ending May 31st, 1918, and ask the reporter to ask you the same question which was asked by Mr. Welch as to the rate of return for the fiscal year ending May 31st, 1913, and ask you what your answer would be as of the fiscal year ending May 31st, 1918, based upon the same balance sheets?

Mr. TOOMEY. Now, Mr. Reporter, will you repeat the first question with those changes as to dates?

The REFEREE. He can answer that, I think, without your asking the first question.

Mr. TOOMEY. Without asking the first question?

The REFEREE. Changing the dates and asking the first question.

The WITNESS. I think you better repeat the question so I can be sure.

(The stenographer repeated the question, as follows:)

332 "Question: Now, I show you statement of assets and liabilities of the Haberle Crystal Springs Brewing Company, as of May 31st, 1918, as presented in evidence in this proceeding, being the nearest date in point of time to March first, 1919 (1918), on which the books of said company were closed. Upon the basis of the figures of various clas'es of investment shown in that statement, taking into consideration the nature of the business and your general knowledge of the history of this business, what would you say would be the necessary yield to an investor in the securities of that company on or about March first, 1918?"

The WITNESS. I take it that the gist of this question is what would an investor require to buy this security at that time in the way of income. Is that the idea of the question entirely?

Mr. TOOMEY. I don't know. He answered that question before. It was intelligible to him as to the first dates used. I am asking now as to 1918.

The WITNESS. Well, I think a man would require more return in 1918 than he would in 1913 or 1914.

By Mr. TOOMEY:

Q. Well, what return?

A. Why, it would be hard to calculate.

Q. Well, it would not be any harder to calculate, would it?

A. Yes, a great deal harder.

333 Q. Why?

A. Because of the prohibition enforcement act just coming into force.

Q. You recognize, then, Mr. Witness, that the character of the business and the state of the prohibition movement as of a given date determines and is one of the big factors in your answer to the question propounded to you by Mr. Welch?

A. In the first instance, no.

Q. Well, it would——

A. (Interrupting.) In 1918 it would be of considerable importance.

Q. If the prohibition movement were at the same position in 1913, your answer would have been different as to that?

A. Yes; it would.

Q. All right. Now, we have a basis for further examination. In other words, the hazardous character of a business determines the amount of return that the investor would expect, naturally?

A. Absolutely.

Q. How many States had enacted prohibition in 1913?

A. I am sure I do not know.

Q. How many States of the Union had local option in 1913?

A. I cannot tell you.

Q. What was the Webb-Kenyon law?

A. What?

Q. What was the Webb-Kenyon law?

A. I don't even know that. I never took much interest in the temperance question or in prohibition.

Q. And you just stated, Mr. Witness, that is one of the important factors in determining the rate of return a man would expect as of a given date from an investment in a brewing establishing; haven't you?

A. In the year 1918; yes.

334 Q. And you said if the issue was similar in 1913 your answer would have been different?

A. Yes, sir.

Q. Then your answer, in order to be intelligible to the question propounded to you by Mr. Welch, must of necessity involve a knowledge of the condition of the prohibition movement as of a given date; is not that correct?

A. As far as the year 1918 is concerned, the general press, the talk in and out of Congress and everything else, the prohibition head lines; that is about all; and the general feeling in Congress in particular, when I was placing and selling securities.

Q. But you have also testified that you did not know anything about the prohibition movement as of March first, 1913?

A. Generally speaking, no.

Mr. TOOMEY. That is all.

Redirect examination by Mr. WELCH:

Q. As to Syracuse, there wasn't any local prohibition in Syracuse in 1913?

A. Not that I know of.

Mr. WELCH. That is all.

Recross-examination by Mr. TOOMEY:

Q. Just a minute. You didn't have any personal holdings in other brewing companies, did you, at that time?

A. I don't recall whether I owned any of the stock of the
335 Ryan's brewery or not, or the other one which we had over here, Bartels.

Q. Were you ever a member of the Brewers' Association?

A. Oh, no.

Q. Did you ever attend any Brewers' Associations meetings as of that time?

A. No, sir; nothing whatever of that kind.

Mr. TOOMEY. That is all.

Mr. WELCH. That is all. I will call Mr. Webster.

DANIEL C. WEBSTER, called as a witness on behalf of the plaintiff and being duly sworn, testified as follows:

Direct examination by Mr. WELCH:

Q. Mr. Webster, you reside in Syracuse?

A. Skaneateles.

Q. You reside in Skaneateles?

A. Yes, sir.

Q. And your business is in Syracuse?

A. In Syracuse.

Q. And what is your business?

A. At present, district manager of the American Bond and Mortgage Company.

Q. And where is that located?

A. New York City.

Q. And your office is in Syracuse here?

A. City Bank Building.

Q. And are you connected with the City Bank?

A. Not at the moment.

336 Q. You have been?

A. Yes, sir.

Q. For how long?
A. Since 1913.
Q. And that is a State bank, trust company, here in Syracuse?
A. Yes, sir.
Q. What was your business prior to 1913, before you went to the City Bank?
A. As a bond salesman from New York.
Q. And did you have an office here in Syracuse for a couple of years prior to 1913?
A. Yes, sir.
Q. And what did you sell; what was your business?
A. Well, I handled a general line of bonds under my own name and some local securities.
Q. And were you familiar with the local securities here in 1913?
A. Yes, sir; to a certain extent.
Q. And were you familiar with listed securities?
A. Yes, sir.
Q. And were you familiar with the yield and fair market value of industrial securities?
A. I think so.
Q. And here in Syracuse at that time?
A. Yes, sir.
Q. You bought and sold them?
A. Yes, sir.
Q. And bought and sold for other people?
A. Yes, sir.
Q. And did a general business in that line?
A. A general investment business.
Q. Now, in your consideration of the fair market value of securities of industrial corporations, do you take into consideration the character of the various classes of assets and the ordinary
337 yield on investment in such assets, as well as the general nature of the business, its location, management, financial backing, and so forth?
A. yes, sir.
Q. In other words, in arriving at the necessary yield on securities to an investor you arrive at a composite rate, considering the security and the necessary yield on the various classes of assets?
A. Yes, sir.
Q. Now, you have there before you the statement of the assets and liabilities of the Haberle Crystal Springs Brewing Company as at May 31st, 1913, as presented in evidence in this proceeding, being the nearest date in point of time to March first, 1913, on which the books of said company were closed. Upon the basis of the figures of the various classes of investments shown in that statement and taking

into consideration the nature of the business and your general knowledge of the history of this business, what would you say would be the necessary yield to an investor in securities of that company on or about March first, 1913. And, now, in addition I wish to state that on that statement bills receivable which are indicated as part of the business and assets appear to be notes secured by mortgages.

Mr. BURDEN. We interpose the general objection and the special objection that it has not been shown the witness is qualified on brewery securities and this class of yield, and no proper foundation has been laid for the question.

Mr. TOOMEY. In other words, we object to his qualifications.

338 The REFEREE. That is true. Objection sustained.

Mr. WELCH. We would not, of course, be limited to this identical security.

The REFEREE. Your question limits him to this security.

Mr. WELCH. What is that?

The REFEREE. Your own question does limit it to that security. He is to base it upon his knowledge of the history of this company.

Mr. WELCH. I will change this question some, your honor.

By Mr. WELCH:

Q. I show you statement of assets and liabilities of the Haberle Crystal Springs Brewing Company, as at May 31st, 1913, as presented in evidence in this proceeding, being the nearest date in point of time to March first, 1913, on which the books of said company were closed. Upon the basis of the figures of various classes of investment shown in that statement and taking into consideration the nature of the business and your general knowledge of the history of such a business, what would you say would be the necessary yield to an investor in the securities of a company on or about March first, 1913, having such assets and liabilities?

Mr. TOOMEY. Same objection, if the court please.

The REFEREE. He hasn't got any history of the business, and he has not said he has any. I think I will have to sustain the

339 objection. I don't think the witness is qualified. Do you?

By Mr. WELCH:

Q. Tell us, do you know anything about the history of the brewing business here in Syracuse back in 1913?

A. The history of the brewing business?

Q. Yes.

A. I can't say that I do, except the general prosperity of it. That is all. I understand you to ask me if I know anything about the history of the brewing business?

Q. Yes.

A. That I can not say that I do.

Q. Well, in 1913, do you know that it was a stable business carried on here at that time?

A. I know that the securities of this company were considered very high grade in 1913.

Mr. BURDEN. May we have on the record a motion without prejudice at this time to strike out the testimony of Mr. Tanner upon the grounds that he disqualified himself by his own testimony on cross-examination as to the important factors upon which his original answer was based as to 1913.

The REFEREE. Well, I will reserve decision on your motion at this time.

Mr. BURDEN. An exception.

By Mr. WELCH:

Q. Do you know and were you familiar with the legal rate of interest in the State of New York in 1913?

A. Yes, sir.

340 Q. What was it?

A. Six per cent.

Q. Now, were you familiar with the yield on the mortgages on real estate here in Syracuse in 1913?

A. You mean the average rate?

Q. Yes.

A. Yes, sir.

Mr. TOOMEY. Objected to as being immaterial.

The REFEREE. How is it immaterial? Objection sustained.

Mr. WELCH. Well, if we can show the average yield on real estate, which this company had, which was from four to five per cent, I think it is material.

Mr. TOOMEY. That was not the business of this company, if the court please.

The REFEREE. Yes. They were not engaged in the mortgage business. I will have to sustain the objection.

Mr. WELCH. Well, your honor, I think I will have to take an exception.

The REFEREE. Very well. An exception to the plaintiff.

Mr. WELCH. Of course, part of their tangible assets was real estate.

The REFEREE. I can not see how that is material. I may be wrong, but that is the way I view it at the present.

Did you ever own any of the securities of this company, Mr. Webster?

The WITNESS. No, sir.

The REFEREE. Do you know the market price at which they were sold in 1913?

341 The WITNESS. That would be rather difficult to answer.

The REFEREE. What is that?

The WITNESS. That would be rather difficult to answer. I should have simply to give a haphazard guess.

The REFEREE. Do you know the actual price at which they were sold?

The WITNESS. In the neighborhood of ninety.

The REFEREE. Well, do you know that?

The WITNESS. Well, I know of some changing hands at that figure, but whether it was in 1913 or not I can't say. That was away back, many years ago.

Mr. WELCH. I think I will have to abide by your ruling then, your honor.

The REFEREE. All right. I think you will, too.

Mr. WELCH. You may cross-examine.

Mr. TOOMEY. No cross-examination.

The REFEREE. That is all, Mr. Webster.

Mr. WELCH. I will recall Mr. Biehler.

342 FRANK C. BIEHLER, recalled as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. WELCH:

Q. Now, Mr. Biehler, yesterday you gave some evidence in regard to the Haberle Crystal Springs Brewing Company selling to the Haberle Securities Company for ninety-nine thousand, something, and on a mortgage; now, do you want to correct that testimony?

A. I do.

Q. And in what regard—what do you desire to change?

A. Change mortgage to cash. I stated that that sale was for about one hundred thousand dollars. The actual figures are $99,-455.00, and I also stated that a real-estate mortgage was taken back, which is not so. That was paid in cash by the stockholders of the Securities Company.

Q. Well, it was paid in cash rather than by mortgage?

A. There was a mortgage given afterwards, and it confused my mind, and I thought of it last night after I got home; and I went up and referred to the books and I found out I made that misstatement.

Mr. WELCH. Well, now, I think that is all. I don't think we have left anything out, from putting any records in evidence that I want in; but yesterday something was brought up that there would be no reopening of this case up to put in additional evidence.

The REFEREE. Except on consent.

343 Mr. WELCH. Except on consent. But now if there should be any record that I left out here when I come to check up this evidence, I don't want to be shut out on it.

Mr. TOOMEY. Well, from now to two o'clock is sufficient time to think it over.

Mr. WELCH. I don't know of anything. In other words, I may have produced some record and did not introduce it in evidence.

Mr. TOOMEY. Well, of course, all the regular proceedings in court make it necessary for the case to be closed at some time.

Mr. WELCH. It is closed with the exception, if there is anything I have overlooked.

Mr. TOOMEY. I think we are perfectly within our rights, after all the delays in this trial, the number of concessions we have made, to insist that the plaintiff either to produce and introduce further evidence at this time or close his case before the representatives of the department leave the court and before the briefs are filed.

The REFEREE. There is a stipulation in here that covers that—it cannot be reopened except upon consent.

Now how would this be: Permit Mr. Welch to look over the documents he may have missed until the conclusion of this hearing, until the conclusion of the Government's case. Is that agreeable to you?

Mr. BURDEN. Their case is our case.

344 The REFEREE. I see. Well, then, do you want to adjourn until this afternoon, Mr. Welch, for the purpose of determining whether or not you have completed your case?

Mr. WELCH. Your honor, I think it appears in here that the amount of the capital stock of the Haberle Crystal Springs Brewing Company was eight hundred thousand dollars. Does it appear in the statements?

Mr. SIEBENEICHEN. Yes; it does.

The REFEREE. Yes.

Mr. WELCH. That is the only thing I can think of. I think that is our case.

The REFEREE. All right.

Mr. WELCH. The plaintiff rests.

RENEWAL OF MOTIONS

Mr. BURDEN. The defendant renews all motions to strike out testimony heretofore made, and your honor said decisions were reserved.

The REFEREE. Decisions were reserved on those motions.

Mr. BURDEN. And we renew our exceptions to the refusal to strike out at this time.

The REFEREE. Decisions are reserved.

Motions to Dismiss

Mr. BURDEN. Now, I will make a formal motion, and we are ready to close. We move to dismiss this action upon the ground that the

plaintiff has not proven facts sufficient to establish any
345 cause of action, more particularly, has not proved sufficient facts to establish the cause of action set forth in the complaint, and that upon all of the pleadings and proceedings had and evidence taken the complaint should be dismissed upon the merits.

Mr. TOOMEY. Taking that as a general motion to dismiss, I would add to that a motion of a more specific character, enumerating each of the issues raised either by express allegation or by implication in the plaintiff's complaint.

We move to dismiss on the following special grounds: That the plaintiff can not recover; that the plaintiff has not shown by evidence that it is entitled to recover anything in this action on account of the disallowance by the Treasury Department of their claims for some ninety-eight thousand dollars depreciation on outside real estate, for the following three reasons:

In the first place, the plaintiff Exhibit 1, introduced in evidence, their claim for refund, shows they never presented their contentions in that respect to the Treasury Department as required by section 3226 of the Revised Statutes;

Secondly, for the reason that there is no evidence here to show or contradict the fact that the allowance of some twenty-four thousand dollars depreciation on outside real estate by the Treasury Department was reasonable and correct; and

For the third reason, that the plaintiff has apparently abandoned that part of their case as shown by the pleadings and by
346 reason of the fact that they have not introduced any evidence upon that issue.

On the issue of obsolescence of good will, for the reason that their claim for obsolescence of good will is not sustained in this action by the plaintiff for the following three reasons:

First, that there is no such deduction authorized by the governing revenue act which is the revenue act of 1918;

Secondly, the plaintiff has failed to show that it had any good will of a provable value as of March first, 1913;

Third, the evidence in this case shows that, even assuming that such a deduction is authorized by the revenue act, and assuming also that they could prove a good-will value as of March first, 1913, the evidence in this case shows conclusively that such good will, if any, was not rendered obsolete by prohibition enactments, in that the plaintiff continued in a similar business.

The evidence further shows that some good will at least was useful and used by it in its new business, and in that connection also the evidence shows that such good will as the plaintiff in this case had

as of the date of liquidation passed through a reorganization to the new company, the Haberle Beverage and Products Company.

On the issue of liquor licenses, I move to dismiss for the reason plaintiff's Exhibit 1, being their claim for refund, shows that that deduction was not urged before the Treasury Department as required by section 3226 of the Revised Statutes.

347 Also, any value attaching to their liquor licenses, powers of attorney, or liquor-tax certificates, or by whatever name call them, constituting a part of the intangible assets of the business and value thereof, if any, as of March first, 1913, would be reflected in the computations relative to the value of all the intangible assets of the business.

Also, that even considering the liquor licenses as attached to the real estate *an* as being a part of the realty, they would not be entitled to recover for the reason that the same was not rendered obsolete by prohibition.

And, on the issue of the obsolescence of the National plant, the plaintiff has failed to show that the National plant was rendered obsolete by prohibition, as the same was sold and was used and it is today being used for other purposes.

I think that covers the ground.

The REFEREE. I will reserve my decision on your motions to dismiss.

Mr. TOOMEY. Your honor, do you wish to have us start on it now or come back?

The REFEREE. Anything you say.

(Discussion outside the record which the stenographer was directed not to take.)

The REFEREE. As I understand, the defendant's case is concluded?

Mr. BURDEN. The defendant elects to stand on its motion.

348 The REFEREE. Very well. We will adjourn to two o'clock this afternoon and then determine upon a date when briefs shall be submitted.

Adjournment taken until two o'clock in the afternoon, same date and place.

Afternoon session, Syracuse, New York, Wednesday, August 26, 1925, 2 p. m.

Presiding: Honorable James J. Barrett, referee. Appearances: (Same as before).

Oral argument by Mr. Toomey on behalf of the defendant.

Oral argument on behalf of the plaintiff by Mr. Welch.

Reply by Mr. Toomey on behalf of the Government, defendant.

Colloquy between court and counsel

Mr. TOOMEY. I think that is all. I have two briefs here to submit.

Mr. WELCH. Now, we haven't got our brief ready yet.

Mr. BURDEN. Now, let me suggest to the court that, if you desire to file a brief, we desire to and request it, we would be glad to file a reply brief to Mr. Welch's brief anyway when it is filed, if your honor will fix the time and handle it in that way. We have a separate brief in this office to file in addition to Mr. Toomey's brief, and I don't know as it is necessary to file it.

Mr. TOOMEY. That is another thing. There is an issue raised here as to the capacity of the plaintiff to sue and that is not treated in here and it is not to be taken as though it was out of the case.

349 Mr. WELCH. Do you raise any question as to that?

Mr. TOOMEY. We do, absolutely.

Mr. BURDEN. Yes, we do; and we have raised it, and now I might say to the court at this time that in view of what Mr. Welch has said about our not producing any witnesses, I am sure that will have no effect on the court, but we are prepared here, not only with experts from the department, but also with experts on real-estate values who have made reports here and to this office and to the Treasury Department and they are on call, but we did not call them and we propose to stand upon the position taken by Mr. Toomey, that they have not made out a case, and that is only fair to say in view of Mr. Welch's remark that we haven't called any witnesses, and we propose to take our medicine from the courts, if we are wrong, and to take the benefit of the particular kindness of the court if we are right. But we have witnesses and are thoroughly prepared, except under these cases we have given to the court, if the court agrees with us that we are right, we do not desire to bother the court with anything more than we have here.

We raised a question of fact. We claim there is no obsolescence of good will in this case to be considered beyond what the Treasury Department has already done for the plaintiff here in the way of allowing depreciation of real estate, which is very liberal, we think. That is all I care to say.

That is all I care to say.

350 The REFEREE. Now, when will we get your brief? Tuesday is the first of September. How about the 20th; would that be all right?

Mr. WELCH. All right. Just a moment, your honor. How about our findings here. I believe, under the order appointing you as special master or referee here, a report on your findings has got to be made and filed too, on or before October first.

The REFEREE. I have got to decide it before October first?

Mr. WELCH, jr. Yes.

Mr. WELCH. What are we going to do about the proposed findings. Will each side submit proposed findings, or are we going to submit on the motions and so forth?

Mr. TOOMEY. I don't know whether we are obliged to or not. I will leave that up to Mr. Burden. I don't know whether we have to or not.

Mr. WELCH. A more simple way, I suppose, would be for each side to submit proposed findings. If you decide with us you follow ours. If you decide with them you follow theirs.

The REFEREE. Now, when are we going to have your brief, first? If I have got to make this decision before October first, I ought to have the briefs as soon as I can get them. Now, how about the 15th of September?

Mr. WELCH. All right.

The REFEREE. All right.' The 15th of September for the plaintiff's brief, and then you will have to exchange. Send your
351 brief to the Government. Give it to Mr. Burden and then he has a right to reply, and how long do you want to reply?

Mr. TOOMEY. If we deem it necessary to reply, we will have it within a few days.

The REFEREE. Five days?

Mr. TOOMEY. Oh, yes.

The REFEREE. And five days in which to reply.

Mr. BURDEN. Better have more than five.

The REFEREE. I have got to have the decision in by October first.

Mr. BURDEN. All right. I will send it right along to Mr. Toomey.

The REFEREE. How about the findings? Do you intend to submit proposed findings?

Mr. BURDEN. Is that necessary for the court to make a decision?

The REFEREE. I have to make findings.

Mr. TOOMEY. He has got to make findings at the conclusion of the case.

The REFEREE. I have to approve or disapprove the findings, one way or the other.

Mr. BURDEN. All right. We will submit findings.

The REFEREE. When will I get your brief?

Mr. BURDEN. I will give it to you now, if I can find it.

Mr. WELCH. Will you give it to me, send me a copy of it?

Mr. BURDEN. What.

Mr. WELCH. Send me a copy of it?

Mr. BURDEN. Yes.

352 Mr. TOOMEY. As I understand it, the referee makes his own findings.

The REFEREE. If you are to submit proposed findings, the referee accepts or rejects them, or he can make his own findings. I can make my own findings, but I would like you to submit proposed findings, because the order requires me to make findings.

Closed.

In United States District Court

[Title omitted.]

Stipulation settling bill of exceptions

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above-entitled action that the foregoing bill of exceptions be settled, signed, and allowed without further comparison and that the same be ordered on file, and

353 It is further stipulated that the term of court at which the judgment was directed and entered has been duly and regularly extended to May 1, 1928.

Dated June 20, 1928.

WELCH & WELCH,
Attorneys for Plaintiff in Error.
OLIVER D. BURDEN,
U. S. Attorney,
Attorney for Defendant in Error.

In United States District Court

[Title omitted.]

Order settling and filing bill of exceptions

The attorneys for the plaintiff above having tendered this as the bill of exceptions to the plaintiff in error with the ruling and

354 holding of the referee upon the trial of this action and of the court in directing and entering judgment of the evidence taken before the referee, and the referee's findings and having requested that the signature and seal of the judge, who found and directed judgment, should be annexed to the same pursuant to the statute in such case made and provided for inasmuch as none of the evidence and other things would appear upon the said record of such case, said judge, pursuant to said request and stipulation of the respective parties, did put his signature and seal upon the bill of exceptions this 25th day of June, 1928, and ordered the same on file.

FRANK COOPER,
United States District Judge.

355 In United States District Court

[Title omitted.]

Petition for writ of error

The petition of the Haberle Crystal Springs Brewing Company, the plaintiff in the above-entitled action, a corporation organized under the laws of the State of New York, having its principal office in the city of Syracuse, county of Onondaga, and State of New York, through its attorneys, Welch & Welch, 706 City Bank Bldg., Syracuse, N. Y., respectfully shows:

1. That heretofore and on or about August 14, 1923, the above-named plaintiff, by the service of the summons and complaint upon defendant, commenced an action against the above-named defendant in the District Court of the United States for the Northern District of New York to recover back with interest the sum of nineteen thousand sixty-two dollars and ninety-five cents ($19,062.95) that it paid under protest on July 6, 1922, on its Federal income-profits tax
356 return for the fiscal year ending May 31, 1919, the same being an overpayment of income and profits taxes for said year which included five hundred sixty-nine dollars and eighty-two cents ($569.82) excess taxes paid by plaintiff for the year 1918, and that said defendant served its answer thereto on February 6, 1924.

2. That plaintiff served and filed its amended complaint on April 14, 1924, and on January 8, 1925, on stipulation filed an amended complaint, and said defendant answered said amended complaint on January 21, 1925.

3. That upon the consent and written stipulation of the parties to this action, filed in the clerk's office of said court on May 5, 1925, and on order of the court on that day upon such consent and stipulation, James J. Barrett was appointed referee to hear, try, and determine all the issues of law and fact raised by the pleadings and arising upon the trial of this action.

4. That said action went to trial before said referee on June 29, 1925, at Syracuse, N. Y., and ended on August 26, 1925.

5. That on January 13, 1926, said referee made his findings of fact and conclusions of law wherein he directed judgment in favor of plaintiff and against defendant for the sum of sixteen thousand six hundred eighteen dollars and eight cents ($16,618.08) with interest at 6% per annum from July 6, 1922, and costs, which findings were filed with the clerk of said court on the 14th day of January, 1926.

357 6. That on January 22, 1926, plaintiff filed exceptions to some of said referee's findings, and on January 23, 1926, defendant also filed exceptions to said referee's findings.

7. That on January 24, 1926, plaintiff made application for judgment to the court with Hon. Frank Cooper, judge, presiding in the city of Albany, and that said Judge Cooper wrote an opinion which was filed with said clerk of said court on June 29, 1927, holding that plaintiff was not entitled to judgment.

8. That on January 28, 1927, an order was granted by said court denying plaintiff's said application for judgment, and on the same day defendant was granted judgment dismissing plaintiff's complaint with judgment against plaintiff for the sum of nine hundred eighty-seven dollars and ninety-three cents ($987.93) costs and disbursements, which judgment was entered on November 28, 1927, in the clerk's office of the clerk of said court.

9. That upon the granting of said judgment dismissing plaintiff's complaint an order was entered in the minutes of the court extending the term of said court two months to January 27, 1928.

10. That said plaintiff, at the time of the granting of said judgment dismissing plaintiff's complaint, took and filed exceptions thereto and to the refusal of the court to grant plaintiff judgment on said referee's findings as applied for by plaintiff.

358 11. Your petitioner further shows that in said judgment dismissing plaintiff's complaint, the refusal of the court to grant judgment as applied for in said referee's findings and the trial and proceedings had prior thereto in this action, certain manifest errors were committed to the prejudice and great damage of this plaintiff, all of which will more fully appear from the assignment of errors herein dated January 12, 1928, and submitted with this petition.

Wherefore the plaintiff, the Haberle Crystal Springs Brewing Company, prays that a writ of error be issued in its behalf out of the United States Circuit Court of Appeals for the Second Judicial Circuit for the correction of said errors and that a transcript of the records, proceedings, and papers in this cause, duly authenticated, may be sent to the Circuit Court of Appeals for the Second Judicial District.

Dated, January 12, 1928.

HABERLE CRYSTAL SPRING BREWING COMPANY,
By FRANK C. BIEHLER, *Treasurer.*
WELCH & WELCH, *Attorneys for Petitioner.*

706 City Bank Building, Syracuse, New York.

[Duly sworn to by Frank C. Biehler; jurat omitted in printing.]

360 Read on application for writ of error. Writ allowed and supercedeas bond fixed at $2,500.00 the 14 day of January, 1928.

FRANK COOPER,
United States District Judge.

(Endorsed:) Filed Jany. 20, 1928. John W. Hahn, clerk.

In United States District Court

[Title omitted.]

Assignment of errors

Filed Jan. 28, 1928

Now comes the plaintiff, the Haberle Crystal Spring Brewing Company, in the above-entitled cause, by Welch & Welch, its attorneys, and in connection with its petition for a writ of error in this cause assigns the following errors, which the plaintiff and plaintiff in error avers occurred on the trial thereof and entry of judg-
361 ment thereon and upon which it relies to reverse the judgment entered herein as appears of record:

That on May 5, 1925, the parties to this action, by their respective attorneys, entered into a written stipulation which was on that day filed with the clerk of the United States District Court for the Northern District of New York, as follows:

United States District Court, Northern District of New York

THE HABERLE-CRYSTAL SPRING BREWING COMPANY, PLAINTIFF

vs.

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE 21st District, New York, defendant

This case being upon the calendar of the term of the above court commenced at the court house in the city of Syracuse, N. Y., on May 4th, 1925, and it appearing that this case is a difficult case to be tried before a jury, being complicated and involving a long account and many figures and facts concerning many figures will be involved and a jury trial being waived in open court, it is

Stipulated and consented to in open court that James J. Barrett, Esq., attorney, of Syracuse, N. Y., be appointed sole referee to hear and try all the issues herein both of law and fact raised by
362 the pleadings and arising upon the trial or hearing herein, and

It is further stipulated that said referee shall report to this court the evidence taken before him with his findings of fact and conclusions of law and his decision thereon by the 1st day of October, 1925, and the same shall be filed to wait the further action of this court to approve or disapprove the same.

(Signed) WELCH & WELCH,
Attorneys for Plaintiff.

(Signed) OLIVER D. BURDEN,
U. S. Attorney for the Northern Dist. of N. Y. & Attorney for Defendant.

(Endorsed:) Filed May 5, 1925. (Signed) C. W. Higgison, clerk.

That on said May 5, 1925, said court with Honorable Frank Cooper, district judge, presiding, at a regular term thereof held at Syracuse, N. Y., for the said 21st District of New York, made an order of reference by and with the consent of the parties to the action, by which all the issues in this action raised by the pleadings of law and fact were referred to Hon. James J. Barrett as referee to hear, try, and determine the same, which said order was on said May 5, 1925, duly filed and entered with the said clerk of this court and is as follows:

363 At a term of the United States District Court held at the court house, in the city of Syracuse, N. Y., on the 5th day of May, 1925, in and for the Northern District of the State of New York. Present, Hon. Frank Cooper, U. S. District Judge, presiding.

United States District Court, Northern District of New York

THE HABERLE-CRYSTAL SPRING BREWING COMPANY, PLAINTIFF

vs.

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE 21ST District, New York, defendant

This case being upon the calendar of a term of the above court commenced at the court house in the city of Syracuse, N. Y., on May 4, 1925, and it appearing that this case is a difficult case to be tried before a jury and that it involves a long account and many figures and facts concerning many figures will be involved, and both parties being in court and their written stipulation, dated May 5, 1925, waving a trial by jury and consenting to a reference being herewith filed, and both parties consenting thereto in open court, it is

Ordered, adjudged, and decreed that James J. Barrett, an
364 attorney, of Syracuse, N. Y., be and he hereby is appointed referee to hear and try all the issues of law and fact raised by the pleadings and arising upon the trial of this action, and it is further

Ordered, adjudged, and decreed that said referee shall report to this court the evidence taken before him with his findings of fact and conclusions of law and his decision thereon by the 1st day of October, 1925, and the same shall be filed to wait the further action of this court to approve or disapprove the said findings of fact, conclusions of law and decision in whole or in part.

FRANK COOPER,
U. S. District Judge,
Northern District of New York.

(Endorsed:) Filed and entered May 5, 1925. (Signed) C. W. Higgison, clerk.

That after the entry of said order of reference said referee duly took and subscribed his oath of office and this cause and all the issues in this action of law and fact were tried out before said referee, and after hearing all the evidence and arguments of counsel said referee made his findings of fact and conclusions of law wherein he found for and directed judgment for plaintiff and against the defendant for the sum of $16,618.08 with interest from the 6th day of July, 1922, with costs which said findings were duly filed with said clerk on the 14th day of January, 1926, and were and are as follows:

365 In the United States District Court for the Northern District of New York

THE HABERLE-CRYSTAL SPRING BREWING COMPANY, PLAINTIFF

vs.

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE 21ST District, New York, defendant

By order dated May 5, 1925, the above-entitled action was referred to me to hear and try all the issues of law and fact raised by the pleadings and arising upon the trial of the action, and the issues raised by the pleadings having been duly tried and submitted, and due deliberation having been had, I do find and decide as follows:

FINDINGS OF FACT

1. The Haberle Crystal Spring Brewing Company was organized May 23, 1892, under the laws of New York, with its principal place of business at Syracuse, New York, and from the date of its incorporation until October 29, 1919, it was engaged in the manufacture, sale, and marketing of lager beer and ale, and was compelled to cease such business in October, 1919, by reason of Federal prohibition legislation. (R. 51,53163.)

366 2. The plaintiff went into voluntary liquidation under section 221 of the general corporation law of New York on December 31, 1920, and thereafter brought this action in its own name. (R. 53. Complaint title.)

3. At all times material to the determination of this case plaintiff kept its accounts and records on the basis of a fiscal year ending on May 31st. (Comp. 9, Ans. 9.)

4. The defendant was at all the times mentioned in the complaint a collector of internal revenue for the 21st district, New York, with his office for the transaction of business in the city of Syracuse, New York. (Comp. 1, Ans. 1.)

5. The plaintiff duly filed a Federal income and profits-tax return for the fiscal year ending May 31, 1919, and paid the tax of $11,087.02 shown to be due thereby. The Commissioner of Internal Revenue made an additional assessment of income and excess-profits taxes in the amount of $17,283.30 against the plaintiff for the fiscal year ending May 31, 1919, and the plaintiff filed a claim for abatement of such assessment prior to June 23, 1922. Said additional tax of $17,283.20 plus $1,209.83 interest was duly paid by the plaintiff under protest to the defendant herein on July 6, 1922. (Comp. 10, Ans. 10, R. 40, P. Ex. 1, R. 126, 158, 159.)

6. Plaintiff's claim for recovery in this action is now limited to an alleged overpayment of income and profits taxes for the fiscal
367 year ending May 31, 1919, in the maximum amount of $15,530.92 and interest at six per cent from March 29, 1921, to June 12, 1922, and interest. (R. 327,357.)

7. For the fiscal year ending May 31, 1919, plaintiff filed a corporation income and excess profits return showing a net income subject to tax of $102,522.27, which sum was arrived at by the deduction from its gross income, among other things, of the sum of $123,525.63, alleged depreciation on real estate, which upon revision and audit was reduced to $24,755.15, which was determined to be a reasonable allowance for depreciation. The excessive depreciation claimed, to wit, the sum of $98,790.48, was added back to income, making a corrected net income of $201,312.75, upon which the additional tax of $17,283.30 was duly assessed. It was not claimed specifically in said return that plaintiff was entitled to a deduction from gross income on account of obsolescence of good will. (Sched. B. Comp., par. 18 Comp., Pltff. Ex. 1.)

8. Under date of June 23, 1922, the Commissioner of Internal Revenue notified the plaintiff that said claim for abatement was rejected in full, said notification reading as follows:

TREASURY DEPARTMENT.
Washington, June 23, 1922.

Office of Commissioner of Internal Revenue

IT:CA:M–3
JWN–3
368 HABERLE-CRYSTAL SPRING BREWING COMPANY,
500 Butternut Street, Syracuse, New York.

SIRS: Your claim for refund of $569.82 and abatement of $17,283.30, corporation income and profits taxes for the years 1918 and 1919, respectively, on account of obsolescence of good will, have been examined.

Your return for 1921 shows that the corporation is engaging in the manufacturing of nonintoxicating beverages. In this connection your attention is invited to office decision 472, found in Bulletin 17–20–884, paragraph 3, which reads in part as follows:

"No allowance for obsolescence will be granted in any case wherein connection with the operation of the business the good will will be valuable in another business, after the termination of the business in which the taxpayer is engaged."

Your attention is further invited to office decision 818, found in Bulletin 8–21–1465, which reads in part as follows:

"In the case of dealers who continue in a similar trade or business, the useful life of such intangibles is not definitely limited, although the profits may have been deduced. Therefore, liquor dealers who continue in a similar trade or business cannot obtain a deduc-
369 tion under section 214 (8), on account of obsolescence of their good will, trade marks, and trade brands."

It is held, therefore, that the good will of your business is still valuable in connection with your present business. Your claims are, therefore, rejected. The rejection of your claims will appear officially in the next schedule to be approved by the commissioner.

Respectfully,

E. H. BATSON,
Deputy Commissioner.
By F. R. CHUTE,
Head of Division.

(Comp. 12. Ans. 12, P. Ex. 7.)

9. On or about November 19, 1923, the plaintiff duly filed a claim for refund of $19,062.95 taxes and interest paid for the fiscal years ended May 31, 1918, and May 31, 1919. This included a claim for the refund of taxes for the fiscal year ended May 31, 1919, in the amount of $15,530.92 and the interest paid attributable thereto for one year and two months at 6% per annum, amounting to $1,087.16, making the total refund claimed for the fiscal year 1919 the sum of $16,618.08. Said claim for refund was predicted solely upon the alleged right of the plaintiff to deduct from its gross income for said year a reasonable allowance for obsolescence of good will. (Comp. 13, 19, Ans. 13, 19, P. Ex. 1, R. 40, 230, 329, 357.)

10. For the purposes of its said claim for refund plaintiff
370 accepted as correct the commissioner's determination of a reasonable allowance for depreciation of real estate. Though this issue is raised in the pleadings, no testimony was offered thereon by the plaintiff, and the referee therefore finds that there is no evidence to support a recovery on account of the disallowance by the Commissioner of Internal Revenue of the sum of $98,970.48 of

the $123,525.63 depreciation claimed on its buildings situated on its outside real estate. (P. Ex. 1.)

11. On or about July 25, 1923, the Commissioner of Internal Revenue rejected said claim for refund in the following language:

IT:CA:M-3.
ADS-2121-11.
HABERLE CRYSTAL SPRING BREWING CO.,
500 Butternut Street, Syracuse, N. Y.

SIRS: Reference is made to your claim for refund of income and profits taxes for the fiscal years ended May 31, 1918, and May 31, 1919, in the amount of $19,062.95, based upon your claim for a deduction for obsolescence of good will.

An examination of the information submitted discloses the
371 fact that you engaged in the manufacture of nonintoxicating beverages after prohibition became effective.

In this connection, you are advised that, in accordance with the provisions of O. D. 818, no deduction for obsolescence of good will is allowable to a taxpayer who continues in a similar trade or business after discontinuing its regular business because of prohibition.

Your claim will, therefore, be rejected in full, and the formal rejection will officially appear on the next schedule to be approved by the Commissioner of Internal Revenue.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By F. R. CLUTE,
Head of Division.

(Comp. 31.—Sched. A, Ans. 19.)

12. This action was commenced by the service of the summons and complaint on the defendant on or about August 10, 1923, after the rejection of said claim for refund and within five years from the date of the payment of the additional assessment for the fiscal year 1919. (Comp. 36, Ans. 36, R. 10.)

13. The net income of the plaintiff for the fiscal years ended May 31, 1908, to May 31, 1912, inclusive, was as follows:

372

Fiscal year ended May 31—	Net tangible assets
1908	$112,371.11
1909	110,803.81
1910	122,998.19
1911	130,831.39
1912	100,664.37
Total for five years	$577,668.87
Average annual income	$115,533.77

(R. 86, 87, 170, 203, 205, P. Ex. 10, P. Ex. 12.)

14. The net assets of the plaintiff, including no amounts for good will, trade names and brands, or other intangible assets, at the end of each of the fiscal years ended May 31, 1908, to May 31, 1912, were as follows:

Fiscal year ended May 31—	Net tangible assets
1908	$1,461,492.47
1909	1,523,706.08
1910	1,552,324.44
1911	1,619,155.83
1912	1,653,608.05
Total	$7,810,286.87
Average net tangible assets	$1,562,057.37

(R. 210, 211, P. Ex. 10, P. Ex. 12.)

The average tangible net worth of plaintiff as of the beginning of said years was $1,510,760.04.

15. On March 1, 1913, not more than 6% per annum was
373 a fair and reasonable return on the investment of tangible assets in the brewery business carried on by the plaintiff, and 12½% per annum was a fair return on the intangible assets invested in the brewery business carried on by the plaintiff. (R. 178, 371, 372, 376.)

16. The actual value on March 1, 1913, of the plaintiff's good will was not less $174,482.64, determined as follows:

Average annual income for the five preceeding years	$115,533.77
6% return on average tangible assets of $1,562,057.37	93,723.44
Annual earnings attributable to good will	$21,810.33
Actual value on March 1, 1913, of good will determined by capitalizing earnings attributable thereto on a 12½% basis	$174,482.64

(R. 213, 218, Pl. Ex. 12.)

17. The parties hereto have agreed that if any deduction from plaintiff's income for the fiscal year 1919 for obsolescence of good will is allowable under the statute, such deduction shall be 365/715ths of the value of such good will on March 1, 1913. The numerator of the fraction is the number of days in the fiscal year 1919; the denominator of the fraction is the number of days from January 31, 1918, to January 16, 1920. The Commissioner of Internal Rev-
enue has decided that by January 31, 1918, it became reason-
374 ably apparent that national prohibition would be adopted. The prohibition amendment to the Constitution became effective on January 16, 1920. The deduction for obsolescence of good will in the fiscal year 1919 on this basis is $89,071.55. (R. 326, 327, 337, 343, 348, 355.)

18. In every year from 1908 to the time when the manufacture and sale of ale and beer was prohibited by Federal legislation the plaintiff made a substantial net income and paid dividends on its stock.

Its net income for the years 1908 to 1912, inclusive, was as set forth in finding No. 11. Its net income for the year 1913 and thereafter was as follows:

Fiscal year ended May 31:	Net income
1913	$145,623.02
1914	235,692.03
1915	147,647.24
1916	127,587.53
1917	125,351.24
1918	134,365.20
1919	125,135.65
In the period from June 1, 1919, to October 31, 1919, the company's profit from operations was	$106,869.72

This figure is before taking into account miscellaneous additions to income and expenses. (R. 89, 205, 207, P. Ex. 10, 11.)

19. The plaintiff made no net profit but sustained net losses in each accounting period after October 28, 1919, the date upon
375 which the manufacture and sale of beer and ale was prohibited by Federal prohibition legislation.

For the period from November 1, 1919, to May 31, 1920, the operating loss was $82,565.70. This was before miscellaneous additions to income and miscellaneous expenses. For the fiscal year ended May 31, 1921, the net loss was $72,592.89. (R. 76, 172, 173, 176, 304.)

20. The net sales of the plaintiff for the fiscal years ending May 31, 1915 to 1921, were as follows:

1915—Lager and ale net sales	$1,162,769.04
1916—Lager and ale net sales	1,148,003.84
1917—Lager and ale net sales	1,248,567.27
1918—Lager and ale net sales	1,454,871.75
1919—Lager and ale net sales	1,831,717.80
June 1st to October 31, 1919, larger and ale net sales (five months)	1,015,318.57
November 1, 1919, to May 31, 1920, soft drinks and cereal beverages (seven months)	259,139.22
1921—Soft drinks and cereal beverages	235,622.65

(P. Ex. 11, R. 172.)

21. After national prohibition became effective by Federal legislation the plaintiff had no good will, and the value of its good will was wholly destroyed by prohibition legislation. (R. 76, 172.)

22. That from the year 1904 to October, 1919, plaintiff
376 owned and operated two plants—the "Haberle plant," located at 500 Butternut St., which was devoted to the brewing of lager beer, and the "National plant," located at 1000 Burnet Avenue, Syracuse, which was devoted to the brewing of ale. During October, 1919, all brewing operations at the National plant ceased. The plaintiff thereafter confined its brewing activities to its Haberle plant, where it continued in the business of manufacturing and selling soft drinks and cereal beverages until its liquidation on December 23, 1920. The

volume of business at these two plants was substantially equal, and the annual net income derived from the operations of each plant was substantially the same. (R. 76, 77, 59, 71, 80, 162.)

23. Pursuant to an accepted plan of liquidation a new corporation, known as the Haberle Beverage and Products Company, was organized as of January 1, 1921, which took over the Haberle plant and all other property of the plaintiff except cash on hand, Liberty bonds, real-estate mortgages, saloon and hotel properties, the National plant and equipment, accounts and inventories connected therewith. The Haberle Beverage and Products Company continued the business of manufacturing and selling soft drinks and cereal beverages theretofore conducted by the plaintiff at the Haberle plant and is still carrying on the same business at the same location at 500 Butternut St., Syracuse. With the exception of one individual the stock-
377 holders of the Haberle Beverage and Products Company are identical with the former stockholders of the plaintiff corporation. (P. Ex. 1, R. 181, 308.)

24. The National plant was retained, to be disposed of in accordance with the judgment of the liquidating directors of the plaintiff company. A new corporation, known as the Haberle Securities Company, was thereafter organized, which, on December 31, 1921, took over the National plant for a consideration of approximately $100,000. With the exception of one individual the stockholders of the Haberle Securities Company are identical with the former stockholders of the plaintiff corporation and with the stockholders of the Haberle Beverage and Products Company. (P. Ex. 1, R. 306.)

25. On November 30, 1922, the Central City Cold Storage Company was organized, which company took over the National plant for a consideration of approximately $100,000. With the exception of one individual the stockholders of this new corporation are identical with the former stockholders of the plaintiff company and with the stockholders of the Haberle Beverage & Products Company. Since its incorporation said company has been and still is engaged in the operation of the former "National Brewery" as a cold-storage plant, with its place of business and headquarters in said plant at 1000 Burnet Ave., Syracuse. (R. 308, 310.)

378 26. That at all times, from its incorporation to January 1, 1918, the effective date of the President's war-time proclamation under the emergency food survey act, the plaintiff manufactured and sold lager beer and ale containing an alcoholic content of more than 4%. From January 1, 1918, until October 29, 1919, the alcoholic content of the plaintiff's products was restricted to 2.75%. Plaintiff's products were marketed principally in central New York State in the territory from the Canadian border to the Pennsylvania

line and east as far as Albany and west to the city of Rochester. (R. 164.)

27. From 1904 until October 29, 1919, plaintiff advertised and marketed its products under the names of "Congress Beer" and "Derby Cream Ale." On August 7, 1913, these names were duly filed as trade-marks with the secretary of state of New York. These trade names were widely advertised and well known in Syracuse and surrounding territory before and during 1913, and had a substantial value on March 1, 1913. (R. 105, 106, P. Ex. 19, R. 256, 276, 278.)

28. The Haberle Beverage & Products Company, which, after the dissolution of the plaintiff, used the plaintiff's Butternut Street plant (the Haberle plant) for the manufacture and sale of soft drinks and cereal beverages after prohibition, has been operated at a loss for each year and has never made a net profit nor paid any dividends on its stock. (R. 114, 151, 181.)

379 29. After prohibition became effective in October, 1919, the plaintiff could not legally and did not in fact use the trade names "Derby Cream Ale" and "Congress Beer" at all. It sold no product of any kind after October, 1919, under the names "Derby" or "Derby Cream." The Haberle Beverage & Products Co. did not use the names "Derby" or "Derby Cream," and the plaintiff and the Haberle Beverage & Products Co. sold under the names "Congress" only a cereal beverage differing substantially in content, taste, and selling appeal from the Congress beer formerly sold by plaintiff. (R. 113, 183, 310, 311, 320, 322.)

30. Early in 1918 the officers of the plaintiff became satisfied that prohibition was imminent and took steps to reduce the plaintiff's assets to cash and to prepare for the eventual total or partial liquidation of the company. (R. 130, 137, 146, 147, 150, 151, 166, 169.)

31. In March, 1918, the officers of the company became convinced that because of the imminence of prohibition they would have to close down one of the two plants, and they started working out plans to do something with the National plant. On July 11, 1918, the directors adopted a resolution authorizing the management to discontinue brewing at the National plant. On September 12, 1918, a resolution was adopted stating that because of governmental regulations

380 and restrictions affecting the brewing business the officers were directed to convert as many of the company's assets as possible into cash. On December 12, 1918, steps were taken to buy in 25% of the company's stock pro rata from the stockholders at par, and this was done on March 1, 1919. On October 1, 1919, an additional 25% of the stock was bought in pro rata from the stockholders at par. On March 6, 1920, a 25% dividend was paid. On June 15,

1920, a 4% dividend was paid. Later, in 1920 and 1921, distributions in liquidation were made. On June 4 and December 15, 1919, dividends at 6% and 8% were paid. In all $1,004,659 in cash was paid to the company's stockholders and to the holders of the company's stock which had a par value of $800,000. (R. 130, 137, 146, 147, 150, 151, 166, 169.)

32. From October 28 to December 31, 1920, the Haberle plant at Butternut Street was used by the plaintiff for the manufacture of soft drinks, such as birch beer, ginger ale, orange cheer, lemon lime, root beer, and cereal beverages. (R. 75.)

33. After October 28, 1919, the plaintiff made no cereal beverage or near beer out of ale. The near beer which it manufactured was made at the Haberle plant out of dealcoholized lager beers or by other methods such as checked fermentation, the use of nonfermentable materials and the use of prepared syrups. (R. 76, 80.)

34. Plaintiff's "Congress Beer" and "Derby Cream Ale" were sold prior to October 28, 1919, generally to saloons and hotels.
381 The greater part of the product, probably 90%, was sold in barrels. Most of the places to which beer and ale were sold were owned or controlled by the plaintiff in some manner or other. (R. 107, 108, 110, 303.)

35. The cereal beverages or near beer and the soft drinks sold by the plaintiff had to be sold to a new trade. There was no trade left with saloons. These products had to be sold to places over which the plaintiff generally had no control.

These products had to be sold to a new line of customers, and very little of these products were sold. What was sold was sold largely in bottled form. (R. 109, 112, 165, 303.)

36. The profitable part of the brewery business carried on by plaintiff was the sale of beer and ale in barrels. The sale of bottled products was usually conducted at a loss. (R. 303.)

37. Cereal beverages were more expensive to manufacture than beer. (R. 303, 305.)

38. The soda water, orange cheer, lemon lime, ginger ale, birch beer, and similar products manufactured and sold by the plaintiff after October 28, 1919, contained no alcohol and were manufactured with new equipment purchased for that purpose. None of the old equipment could be used for the manufacture of these products. Cereal beverages manufactured and sold by the plaintiff after October 28, 1919, had an alcoholic content of not more than ½ of 1%. (R. 164, 165.)

39. The plaintiff could not at its plant on Butternut Street
382 (the Haberle plant), after prohibition became effective, make or produce with that plant and machinery a product which

could be legally sold that was similar in taste and effect to that which it produced before prohibition became effective, because it did not have facilities for making such a product. (R. 297–298.)

40. Prior to prohibition there was a large and stable demand for the plaintiff's beer and also containing 4% and 4½% of alcohol. There was almost no demand for the cereal beverages manufactured and sold after prohibition became effective. (R. 304.)

41. The National plant and the machinery and equipment therein were not used or operated at all by the plaintiff after October, 1919, because of the destruction and prohibition of the business of the manufacture and sale of ale by Federal prohibition legislation. The officers of the plaintiff knew in 1919 that the plaintiff would have no use for the machinery in the National plant in the manufacture of soft drinks. (R. 71, 74, 134, 155, 191.)

42. The cost of the land and buildings comprising the National plant, plus additions and less depreciation sustained to October 28, 1919, was $273,305.83. The actual value of the plant after that date did not exceed $50,000, an amount which exceeded the cost of the land alone by more than $20,000. There was, therefore, an obsolescence of the buildings of $223,305.83. The evidence concern-
383 ing it was introduced and received only on the question of obsolescence of good will. It was sold on December 31, 1921, to the Haberle Securities Co. for $99,455 cash. (R. 154, P. Ex. 13, R. 189, 392.)

43. The cost of the machinery and fixtures in the National plant, plus additions and less depreciation sustained to October 28, 1919, was $96,966.48. The machinery and fixtures after October 28, 1919, had only a scrap value. No part of such machinery was used in the manufacture of soft drinks. The machinery and fixtures were ultimately sold for $4,000, indicating an obsolescence of this property due to prohibition legislation of $92,966.48. That evidence concerning it was offered and received only on the question of obsolescence of good will. (P. Ex. 13.)

44. The cost of the vats and casks at the National plant, plus additions and loss depreciation sustained to October 28, 1919, was $15,296.51. These vats and casks were of no value for any purpose after prohibition became effective. That evidence concerning them was offered and received only on the question of obsolescence of good will. (R. 224, P. Ex. 13.)

45. The total obsolescence of the National plant and National machinery and fixtures, vats, and casks was $331,568.82; but there is no evidence in this case to establish a depreciated March 1, 1913, value of the National plant and its equipment and, therefore, no evidence to support a recovery on account of alleged obsolescence

384 of tangible assets for the reason that this evidence was offered upon the question of obsolescence of intangible assets, and received in evidence solely upon that issue.

46. On March 1, 1913, the plaintiff owned and held 130 instruments designated "Assignment of liquor tax certificate, power of attorney, and notice to excise issuing officer." On January 20, 1918, the plaintiff owned and held 131 such instruments. On October 3, 1918, the plaintiff owned and held 103 such instruments. These instruments gave to the plaintiff the control of the right to sell intoxicating liquors in the locations mentioned therein, and the right to transfer such licenses to new locations, and to renew the licenses thus controlled annually from year to year. The ownership of these instruments enabled the plaintiff to require the proprietors at these locations to buy exclusively the product manufactured by the plaintiff. The plaintiff also owned various pieces of property licensed saloon properties controlled by plaintiff in which its products were exclusively sold. (P. Ex. 15, 17, R. 248, 251–253, 261.)

47. These instruments on March 1, 1913, had an actual cash value of $2,500 each, making a total value of $325,000. The value of such instruments and the renewals thereof were wholly destroyed by the Federal prohibition legislation, and they were of no value after October 28, 1919, thus indicating an obsolescence of these assets in the amount of $325,000. That these instruments are
385 in evidence in this case only upon the question of obsolescence of intangible assets and there is, therefore, no evidence to support a separate recovery on account of their alleged obsolescence. (R. 255, 265, 266, 271, 276, 239.)

48. The national prohibition amendment was adopted by the Senate by a vote of 65 to 20 on August 1, 1917, and on December 17th it was adopted in the House with slight changes, by a vote of 282 to 128. These slight differences were adjusted and the amendment was finally adopted by both Houses on December 18, 1917.

During the year 1918 seventeen States were in session prior to June 1st. Of these seventeen, the following twelve ratified, with the following votes:

	Senate	House
Missouri (Jan. 8)	28— 5	93— 3
Virginia (Jan. 10)	30— 8	84—13
Kentucky (Jan. 14)	28— 6	66—10
South Carolina (Jan. 18)	28— 6	66—29
North Dakota (Jan. 25)	43— 2	96—10
Maryland (Feb. 13)	18— 7	58—36
Montana (Feb. 19)	35— 2	77— 8
Texas (Feb. 28)	15— 7	72—30
Delaware (Mar. 18)	13— 3	27— 6
South Dakota (Mar. 19)	43— 0	86— 0
Massachusetts (Apr. 2)	27—12	145—91
Arizona (May 23)	Unanimous.	29— 3

386 During the latter part of 1918 the following three States adopted the amendment by the following votes:

Georgia (June 26)	34— 2	129—24
Louisiana (Aug. 6)	21—20	69—41
Florida (Nov. 27)	25— 2	61— 3

During the year 1919, in two weeks from January 2nd to January 16th, twenty-one States ratified by similar votes, and on this latter date thirty-six States had ratified it and the amendment became a part of the Constitution. Within a short time thereafter nine more States ratified, making a total of forty-five States out of forty-eight.

CONCLUSIONS OF LAW

1. The plaintiff has capacity to sue in its own name.

2. Section 234 (a) (7) of the revenue act of 1918 entitled the plaintiff to deduct from income of the year ending May 31, 1919, a reasonable allowance for the obsolescence of its good will, the value of which was wholly destroyed by prohibition legislation.

3. The plaintiff is not barred from deducting a reasonable allowance for obsolescence of its good will, the value of which was destroyed by prohibition legislation, because of the fact that it made a wholly unsuccessful attempt to develop a soft drink and cereal beverage business.

387 4. The deduction which the plaintiff is entitled to make from income of the year ending May 31, 1919, for obsolescence of its good will is an amount equal to 365/715ths of the actual value of plaintiff's good will on March 1, 1913.

5. The plaintiff is not entitled to any independent deduction from its gross income for the fiscal year ended May 31, 1919, on account of the alleged obsolescence of its New York State liquor licenses or its powers of attorney or assignments controlling same.

6. The plaintiff is not entitled to any deduction from its gross income for the fiscal year ended May 31, 1919, on account of the alleged obsolescence of tangible assets including its national plant.

7. Plaintiff is not entitled to any further deduction from its gross income for the fiscal year ended May 31, 1919, on account of depreciation of buildings situated on its so-called outside real estate.

The defendant's motion to dismiss should be denied.

9. The plaintiff is entitled to a judgment for $16.618.08 together with interest at 6% per annum from July 6, 1922, and costs.

Dated, January 13, 1926.

JAMES J. BARRETT, *Referee.*

388 (Endorsed:) Filed in the office of the clerk of the U. S. District Court for the Northern District of New York, Jany. 14, 1926.

That said plaintiff requested said referee, among other things, to make the following findings of fact:

"From 1904 to 1919 the plaintiff operated two wholly separate plants in Syracuse, the National plant, at which it manufactured Derby cream ale, and the Haberle plant, at which it manufactured Congress beer. The volume of business done at these two plants was substantially equal, and the annual net income derived from the operations of each plant was substantially the same. (R. pp. 59, 71, 80, 162.)

"The National plant and the machinery and equipment therein were not used or operated at all by the plaintiff after October, 1919, because of the destruction and prohibition of the business of the manufacture and sale of ale by Federal prohibition legislation. The officers of the plaintiff knew in 1918 that the plaintiff would have no use for the machinery in the National plant in the manufacture of soft drinks. (R. pp. 71, 74, 134, 155, 191.)

"The cost of the land and buildings comprising the National plant, plus additions and less depreciation sustained to October 28, 1919, was $273,305.83. The actual value of the plant after that
389 date did not exceed $50,000, an amount which exceeded the cost of the land alone by more than $20,000. There was therefore an obsolescence of the buildings of $223,305.83. (R. p. 154; plaintiff's Exhibit No. 13.)

"The National plant after the further expenditures of $60,000 in alterations and improvements was sold on December 31, 1921, to the Haberle Securities Co. for $99,455 cash. It was sold on November 30, 1922, to the Central City Cold Storage Co. for $100,000, paid by giving a mortgage for $100,000, and is now used as a cold storage plant. (R. pp. 188, 189, 305, 309, 392, 393.)

"The cost of the machinery and fixtures in the National plant, plus additions and less depreciation sustained to October 28, 1919, was $96,966.48. The machinery and fixtures after October 28, 1919, had only a scrap value. No part of such machinery was used in the manufacture of soft drinks. The machinery and fixtures were ultimately sold for $4,000, indicating an obsolescence of this property due to prohibition legislation of $92,966.48. (R. pp. 189, 244; plaintiff's Exhibit No. 13.)

"The cost of the vats and casks at the National plant, plus additions and less depreciation sustained to October 28, 1919, was $15,296.51. These vats and casks were of no value for any purpose after prohibition became effective. (R. p. 224; plaintiff's Exhibit No. 13.)

"The total obsolescence of the National plant and the
390 National machinery and fixtures, vats and casks, was $331,568.82. 365/715 of this amount is the deduction which should be made from the plaintiff's income for the fiscal year 1919, if any

deduction is allowed for obsolescence of the National plant, machinery, and fixtures. The 1919 deduction thus amounts to $167,582.68. (Finding 15.)

"On March 1, 1913, the plaintiff owned and held 130 instruments designated 'Assignment of liquor tax certificate, power of attorney, and notice to excise issuing officer.' On January 20, 1918, the plaintiff owned and held 131 such instruments. On October 3, 1918, the plaintiff owned and held 103 such instruments. These instruments gave to the plaintiff the control of the right to sell intoxicating liquors in the locations mentioned therein, and the right to transfer such licenses to new locations, and to renew the licenses thus controlled annually from year to year. The ownership of these instruments enabled the plaintiff to require the proprietors at these locations to buy exclusively the product manufactured by the plaintiff. (P. p. 237, plaintiff's Exhibit No. 14, R. 238; plaintiff's Exhibit No. 6, R. 241, 246; plaintiff's Exhibit No. 15, R. 248; plaintiff's Exhibit No. 17, R. pp. 251–253, 261.)

"These instruments on March 1, 1913, had an actual cash value of $2,500 each, making a total value of $325,000. The value of such instruments and the renewals thereof were wholly destroyed by
391 the Federal prohibition legislation, and they were of no value after October 28, 1919, thus indicating an obsolescence of these assets in the amount of $325,000. 365/715ths of this amount is $165,909.09, and this is the deduction to be made from 1919 income for obsolescence of these assets. (R. 255, 265, 266, 271, 274.)"

1. That said referee erred in failing and refusing to make said findings of fact as requested by plaintiff.

Said plaintiff also requested said referee to make, among others, the following conclusions of law:

"The plaintiff is entitled to deduct from income of the year ending May 31, 1919, a reasonable allowance for the obsolescence of its agreements covering liquor tax certificates and powers of attorney, the value of which was wholly destroyed by prohibition legislation.

"The deduction which the plaintiff is entitled to make from income of the year ending May 31, 1919, for obsolescence of its liquor tax certificates and powers of attorney is 365/715ths of the actual value of such assets on March 1, 1913.

"The plaintiff is entitled to deduct from income of the year ending May 31, 1919, a reasonable allowance for the obsolescence of its National plant, machinery, fixtures, vats, and casks therein, the value of which was reduced to a nominal amount by prohibition legislation.

"The deduction which the plaintiff is entitled to make from
392 income of the year ending May 31, 1919, for obsolescence of its National plant, the machinery, fixtures, vats, and casks

therein, is 365/715ths of the costs of such assets, adjusted for additions and depreciation, to the time prohibition became effective.

"The plaintiff has the right to base its suit for recovery of the amount claimed in its appeal to the commissioner, upon facts and grounds other than those presented to the Commissioner of Internal Revenue in the appeal required by section 3226, R. S."

2. That said referee refused to hold and make said conclusions of law and he erred in refussing to so do.

That said referee refused to make said findings of fact and conclusions of law as requested by said plaintiff, and that said plaintiff filed exceptions thereto and to said referee's findings as follows:

393 In the United States District Court for the Northern District of New York

THE HABERLE-CRYSTAL SPRING BREWING COMPANY, PLAINTIFF

vs.

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

To the CLERK OF THIS COURT, and OLIVER D. BURDEN,
U. S. Atty., Atty. for Deft.

PLAINTIFF'S EXCEPTION

The plaintiff herein excepts to the following findings of fact and conclusions of law, herein made by James J. Barrett, referee, before whom this case was tried, which said findings are on file with the clerk of this court in said clerk's office in the city of Utica, Oneida Co., N. Y., as follows:

1. The plaintiff excepts to that part of the 42nd finding of fact made by said referee wherein he finds that "the evidence concerning it was introduced and received only on the question of obsolescence of good will."

2. The plaintiff excepts to that part of the 43rd finding of fact made by said referee wherein he finds "that the evidence con-
394 cerning it was offered and received only on the question of obsolescence of good will."

3. The plaintiff excepts to that part of the 44th finding of fact made by said referee wherein he finds, "that evidence concerning them was offered and received only on the question of obsolescence of good will."

4. The plaintiff excepts to that part of the 45th finding of fact made by said referee wherein he finds that, "there is no evidence in

this case to establish a depreciated March 1, 1913, value of the National plant and its equipment and, therefore, no evidence to support a recovery on account of alleged obsolescence of tangible assets for the reason that this evidence was offered upon the question of obsolescence of intangible assets, and received in evidence solely upon that issue."

5. The plaintiff excepts to that part of the 47th finding of fact made by said referee wherein he finds that, "that these instruments are in evidence in this case only upon the question of obsolescence to support a separate recovery on account of their alleged obsolescence."

1. The plaintiff excepts to the 5th conclusions of law, as reached and found by him that, "the plaintiff is not entitled to any independent deduction from its gross income for the fiscal year ended
395 May 31, 1919, on account of the alleged obsolescence of its New York State liquor license or its powers of attorney or assignments controlling same."

2. The plaintiff excepts to the 6th conclusions of law, as reached and found by the said referee that "the plaintiff is not entitled to any deduction from its gross income for the fiscal year ended May 31, 1919, on account of the alleged obsolescence of tangible assets including its National plan."

3. The plaintiff excepts to the 7th conclusions of law, as reached and found by the said referee that "plaintiff is not entitled to any further deduction from its gross income for the fiscal year ended May 31, 1919, on account of depreciation of buildings situated on its so-called outside real estate."

Date January 20, 1926.

WELCH & WELCH,
Attorneys for Plaintiff.

Office and P. O. address, 706 City Bank Building, Syracuse, New York.

Filed January 20, 1926.

3. That the foregoing exceptions so taken and filed by plaintiff to the refusal of said referee to find as requested and to his findings
396 of fact and conclusions of law were well taken and calls for a reversal of the judgment granted and entered in this case.

That said plaintiff applied to the court for judgment upon said referee's findings of fact and conclusions of law and that the court fix and include therein plaintiff's costs and disbursements and that said court denied plaintiff's said application for judgment by its order, dated November 28, 1927, and filed and entered in the office of the clerk of the U. S. District Court for the Northern District of New York on December 9, 1927.

At a term of the District Court of the United States of America within and for the northern district of New York, held at the city of Utica, on the 28th day of November, A. D. 1927.

Present: Honorable Frank Cooper, judge of United States District Court.

THE HABERLE-CRYSTAL SPRINGS BREWING COMPANY plaintiff, vs. JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE for the 21st district, New York, defendant	At law, No. 858

Order denying plaintiff judgment

397 On reading and filing plaintiff's notice of motion for judgment dated January 26, 1926, the affidavit of James J. Barrett, verified January 14, 1926, and the affidavit of Walter Welch, verified January 26, 1926, annexed to said notice of motion and on reading the findings of fact and conclusions of law of James J. Barrett, the referee hereinbefore appointed by the order of this court, and after argument of counsel for the respective parties to this action, it is

Ordered that plaintiff's said motion for judgment be and the same is in all things denied and said plaintiff has an exception to my holding and ruling thereon.

FRANK COOPER,
Judge of United States District Court
for the Northern District of New York.

(Endorsed:) Filed Nov. 28, 1927. (Signed) John W. Hahn, clerk.

4. That the court erred in refusing to grant judgment to said plaintiff on his said application and erred in making said order denying the same.

5. That said court erred in granting said defendant's application for judgment upon said referee's said findings of fact and conlusions of law, without making any other findings of fact or conclusions of law, except as is found in said judgment, which judgment was filed and entered in the office of the clerk of the U. S. District Court
398 for the Northern District of New York on the 28th day of November, 1927, and is as follows, viz:

At a term of the District Court of the United States of America within and for the Northern District of New York, held at the city of Utica, on the 28th day of November, A. D. 1927.

Present: Honorable Frank Cooper, judge of United States District Court.

THE HABERLE-CRYSTAL SPRINGS BREWING COMPANY, plaintiff
vs.
JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE for the 21st District, New York, defendant

At Law, No. 858

Judgment of dismissal of action

This cause having come on regularly for decision upon the report of the referee and special master heretofore appointed by consent of the parties to this action and upon an express waiver by them of a trial by jury, and also upon the motion for confirmation of such report in writing, containing the evidence and proof and the findings of fact and conclusions of law of said referee and special master, which by consent of said parties was and is to be subject to the approval of the court, and the court having considered the
399 respective exceptions to such findings and conclusions, by and on behalf of said parties to this action, and having examined the evidence and proof so taken and filed herein and having duly considered the evidence and the pleadings of the parties, and the conclusions of law based upon the pleadings and the evidence, and having heard the arguments of the attorneys for the respective parties and being fully advised thereto,

It is hereby considered, ordered, and adjudged by the court that the said conclusions of law made by said referee and special master, save and except as to the exceptions of said plaintiff, which are overruled, be disapproved, and that said defendant having prevailed on the law in this cause, it further ordered and adjudged that the said plaintiff take nothing by its said action against said defendant, and that its complaint herein be and the same is hereby dismissed at the cost of said plaintiff; and it is further ordered and adjudged that the said defendant recover of the plaintiff his costs in this action, taxed and allowed in the sum of $187.93, and in addition thereto, the further sum of $800.00 hereby taxed and allowed for the compensation of James J. Barrett, Esquire, the referee appointed by this court at the request and stipulation in writing of the attorneys for said respective parties to this action, and that execution issue therefor.

FRANK COOPER,
Judge of said District Court of the United States.

400 (Endorsed:) Filed & entered Nov. 28, 1927. John W. Hahn, clerk.

6. That the court erred in overruling plaintiff's objections to the granting of said judgment dated November 28, 1927, dismissing

plaintiff's complaint and plaintiff's exceptions thereto were well taken and calls for a reversal of the judgment, which said objections and exceptions are as follows, viz:

United States District Court, Northern District of New York

HABERLE-CRYSTAL SPRINGS BREWING COMPANY, plaintiff vs. JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE for the 21st District, New York, defendant	At Law No. 858.

The plaintiff in this action appears upon defendant's motion for judgment herein by Welch & Welch, its attorneys, and raises the following objections:

1. That this court has no jurisdiction or legal power to grant defendant judgment dismissing plaintiff's complaint with costs.

401 2. That James J. Barrett was by the mutual consent and written stipulation of the parties to this action agreed on as sole referee to hear, try, and determine all the issues in this action and that he was on such consent and stipulation appointed such referee by the order of this court and that said referee, after hearing the evidence and a trial of all the issues, determined the rights of the parties, found in favor of the plaintiff, made his findings of fact and conclusions of law and directed judgment thereon in favor of plaintiff and against defendant for $16,618.08, with interest from July 6, 1922, which findings are on file with the clerk of this court and that the only power or jurisdiction this court has over said referee's findings is to fix the costs and referee's fees and direct and give judgment in keeping with said referee's findings.

3. That the powers and duties of this court in granting judgment herein is ministerial only, and that it has no power to change, review, or set aside the findings of said referee or his conclusions of law as reached or found by him herein.

4. That there are no findings of fact or conclusions of law in this case, upon which this court has any power or jurisdiction to grant the proposed judgment herein dismissing plaintiff's complaint with costs.

5. That plaintiff objects to the statement in the first paragraph of said proposed judgment, viz: "which by consent of said parties was

402 and is to be subject to the approval of the court," for the reason that the same is not a correct statement or interpretation of the language of said stipulation and order of reference or the intention or agreement of the parties thereto.

The foregoing objections are all raised on the defendant's said motion for said judgment herein.

Dated at Utica, N. Y., November 28, 1927.

WELCH & WELCH,
Attorneys for Plaintiff.

Office and P. O. address, 706 City Bank Building, Syracuse, New York.

The foregoing objections are overruled with exceptions to the plaintiff in each instance.

Dated November 28, 1927.

FRANK COOPER,
Judge of United States District Court,
Northern District of New York.

(Endorsed:) Filed Dec. 9, 1927. (Signed) John W. Hahn, clerk.

7. That the exceptions taken by plaintiff and filed in the office of the said clerk of the U. S. District Court for the Northern District of New York on the 9th day of December, 1927, to the refusal of the court to grant plaintiff judgment as directed by said referee and to the court granting said judgment dismissing plaintiff's complaint contrary to the findings and direction, were well taken and calls for a reversal of said judgment, which exceptions are as follows, viz:

408 United States District Court, Northern District of New York

THE HABERLE-CRYSTAL SPRINGS BREWING COMPANY, PLAINTIFF

vs.

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE 21ST District of New York, defendant

At law, No. 858

To the clerk of the said District Court of the United States of America within and for the Northern District of New York, and to Oliver D. Burden, United States district attorney, attorney for said defendant.

Please take notice that the above-named plaintiff, the Haberle Crystal Spring Brewing Company, excepts to the findings, orders, and judgment of the court with Hon. Frank Cooper, judge of the United States District Court, presiding, and all proceedings had and taken upon the findings of fact and conclusions of law of Hon. James J. Barrett, heretofore appointed by order of the court on the stipula-

tion and consent of the parties to this action, and said referee, after hearing all the evidence, made his findings of fact and conclusions of law and directed judgment in favor of said plaintiff against
404 said defendant for sixteen thousand six hundred eighteen dollars and eight cents ($16,618.08) with interest thereon from July 6, 1922, all of which findings, motion paper, order, and judgments are on file with the said clerk of this court at Utica, N. Y.

First. That said plaintiff, the Haberle Crystal Spring Brewing Company, excepts to the refusal of the court to grant the plaintiff judgment as applied for in its notice of motion therefor dated January 26, 1926, and returnable at the city of Utica, N. Y., on February 10, 1926, on the ground:

1. That said referee was appointed on the consent of the parties in open court and on the written stipulation of the attorneys for the parties to this action to hear, try, and determine all the issues and that said referee did hear, try, and determine all the issues, made his findings of fact and conclusions of law and directed judgment for plaintiff in the said sum aforesaid with interest from July 6, 1922, and that the said findings of fact and conclusions of law of said referee were fully supported by the evidence and the same and each of them were conclusive upon the court and the court had no power or authority to disregard or overrule the same or either of them.

2. That the parties to this action having stipulated and consented to the appointment of said referee, the court had no jurisdic-
405 tion further over the matter other than to fix the compensation of the referee and the costs and direct judgment for plaintiff as directed by said referee.

Second. The plaintiff excepts to the opinion written by said court upon said plaintiff's motion for judgment and to the whole thereof on the ground:

1. That the same is contrary to law and contrary to the facts in this case.

2. That the same is not applicable to the facts in this case.

Third. Said plaintiff excepts to the order of this court herein made on the 28th day of December, 1927, denying plaintiff's said application for judgment on the ground:

1. That said court had no jurisdiction or legal authority to make said order and deny said plaintiff's application for judgment.

2. That the duties of the court, upon said referee's findings of fact and conclusions of law, were ministerial only and had no legal authority to make said order or different findings of fact or conclusions of law other than was made by said referee.

3. That the said referee's findings of fact and conclusions of law were fully supported by the evidence and the facts.

Fourth. That said plaintiff excepts to the judgment of this court herein granted on November 28, 1927, and entered in the office of the clerk of this court at Utica, N. Y., on or about that date
406 and to the court's holdings and findings therein contained on the ground:

1. That the court had no jurisdiction or legal authority to dismiss plaintiff's complaint on said referee's findings of fact and conclusions of law and that the said findings of fact and conclusions of law of said referee were binding on the court and the court could only enter judgment in compliance with the findings and directions of said referee.

2. That the court in granting said judgment or at no other time made any other or different findings of fact other than those made by said referee and that said judgment dismissing plaintiff's complaint could not be made upon said referee's findings of fact.

3. That said court had no jurisdiction or authority to disapprove the conclusions of law made by said referee and that said conclusions of law of said referee upon the facts in this case were proper and the only legal conclusions that could be drawn or made upon the evidence in the case.

4. That the court had no jurisdiction or authority to disapprove the conclusions of law reached and found by said referee and that all the findings of fact and conclusions of law made by said referee are still in full force and effect and have not been set aside or overruled.

407 5. That the court made no findings of fact or conclusions of law in this case upon which said judgment could be granted herein or authorizing the same.

6. That said judgment is contrary to law, facts, and findings of said referee.

7. That said judgment was granted without any jurisdiction or authority of law or sufficient facts.

8. That said referee's findings of fact and conclusions of law, said order and judgment and all of said papers hereinbefore referred to are on file with the clerk of this court at Utica, N. Y.

Dated, December 6, 1927.

Yours, etc.,

WELCH & WELCH,
Attorneys for Plaintiff.

Office & P. O. Address,
706 City Bank Bldg., Syracuse, New York.

(Endorsed:) Filed, Dec. 9, 1927. (Signed) John W. Hahn, clerk.

8. That the court erred in not affirming the said referee's fin'ings of fact and conclusions of law and directing judgment thereon as

directed by said referee in his findings of fact and conclusions of law.

9. That the court erred in not affirming and following the
408 law of this case as contained in the opinion written by said referee in deciding this case, which opinion was filed in the office of said clerk with his said findings of fact and conclusions of law and is as follows, viz:

United States District Court, Northern District of New York

THE HABERLE-CRYSTAL SPRING BREWING COMPANY, PLAINTIFF

VS.

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Referee's Opinion

Appearances: Welch & Welch, attorneys for plaintiff. Oliver D. Burden, United States attorney; Floyd F. Toomey, special attorney, Bureau of Internal Revenue; H. V. S. Grosbeck, assistant United States attorney, attorneys for defendant. James J. Barrett, referee:

This is an action by the Haberle Crystal Springs Brewing Company to recover income profits taxes in the sum of $15,530.92, together with $1,087.16 interest, paid for the fiscal year ending May 31, 1919.

409 The plaintiff in December, 1920, voluntarily dissolved. For many years it owned and operated two plants at Syracuse, New York, known respectively as the Haberle plant and the National plant, engaged in the manufacture and sale of beer and ale. Its products were known under the trade names of "Congress Beer" and "Derby Cream Ale."

It controlled a number of saloon licenses, providing outlets for its product, and also owned a number of saloon properties. Its business was well established in 1913, its average annual earning for the five years ending May 31, 1912, amounting to $115,533.77, on an average investment for the same period of $1,562,057.37 and it had large earnings until its business was prohibited by Federal legislation effective in 1919, at which time the plaintiff was compelled to discontinue its business. The plaintiff's claim is that it is entitled to deduct from its income of the fiscal year 1919 a reasonable allowance for the obsolescence of its good will, liquor licenses, and national plant, for which items no deductions were allowed in the computation of the tax which the plaintiff paid.

By stipulation of the parties and an order of the court, the matter was referred to me as referee to hear, try, and determine the issues. The testimony has been taken and findings of fact and conclusions of law are submitted herewith.

410 The right of the plaintiff to sue in its own name has been questioned by the defendant. The plaintiff went into voluntary dissolution under section 221 of the general corporation law of the State of New York in December, 1920. This action was commenced by the corporation in its own name in August, 1923.

Section 221 provided in substance that a corporation dissolved thereunder should continue in existence for the purpose of winding up its affairs and could "sue and be sued." The decision in Security Trust Company v. Pritchard (201 A. D., 142), holds that under the provisions of section 221, the plaintiff had the capacity to sue in its own name and that section 35 of the general corporation law did not apply to cases falling under section 221. The substitution of section 105 of the new stock corporation law of said State for section 221 with a special provision for an action in the name of the corporation, made by the legislature while this action was pending and before the service of the amended pleadings and the trial of the case, certainly can not prejudice the plaintiff. Sackheim v. Pigueron. (215 N. Y., 62, 73.)

In the revenue act of 1918 it is provided as follows:

Section 234 (a). That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * (7). A reasonable allowance for the exhaustion,

411 wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

Deductions for obsolescence of good will, trade names, and trade brands of distillers and brewers because of Federal prohibition have apparently been allowed in the practice of the Bureau of Internal Revenue under this law.

See Advisory Tax Board Recommendation No. 44, published in the Treasury Department's Cumulative Bulletin for April-December, 1919, at page 133; also Office Decision 298, published in the same bulletin at page 138. The defendant maintains that this practice was erroneous and in support of his contentions cites the case of Red Wing Malting Co. v. Willcuts, decided by District Court D of Minnesota, Third Division, and reported in 8 Federal Reporter, 2d Series, at page 180, which decision denied the right of deduction for obsolescence of good will on the ground that it was not property within the meaning of the statute.

The term "property" is used in said section 234 without qualification or restriction. (Lynch v. Allworth-Stephens, 267 U. S. 364,

369.) When so used the term "property" is broad in its meaning, including everything which is the subject of ownership or which has an exchangeable value or which goes to make up one's wealth or estate. (32 Cyc. 647; 3 Bouvier's Law Dictionary, page 2750.) Where such term is used in this broad sense it undoubtedly includes
412 good will, trade marks, trade brands, and other intangible property. (28 Corpus Juris, page 729, note 2; 28 Corpus Juris, page 737, note 64.)

Concededly, the term "property" as used in the law includes not only tangible property, but also some kinds of intangible property, such as contracts, leases, and patents. (Lynch v. Allworth-Stephens Co., 267 U. S., 364; Henrici Co. v. Reinecke, 3 F. (second), page 34; Kentucky Tobacco Products Company v. Lucas, 5 F. (second), 723.) The defendant, however, claims that good will, trade marks, and trade names are not of themselves property, but merely incidents of other property, and that for this reason they are not included within section 234 (a) (7).

It might be a sufficient answer to this contention merely to indicate that a valuable and transferable incident of property is necessarily itself included in the comprehensive term "property" since it is something which is the subject of ownership, which has an exchangeable value, and which goes to make up one's wealth or estate. But beyond this it is clear that the courts have held that good will is in and of itself property.

In Washburn v. National Wall Paper Company (81 Federal 17, at page 20), the Circuit Court of Appeals for the Second Circuit said:

"Good will has been defined as 'all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to con-
413 tinue giving their custom to it.' There is nothing marvelous or mysterious about it. When an individual or a firm or a corporation has gone on for an unbroken series of years conducting a particular business and has been so scrupulous in fulfilling every obligation, so careful in maintaining the standard of the goods dealt in, so absolutely honest and fair in all business dealing that customers of the concern have become convinced that their experience in the future will be as satisfactory as it has been in the past, while such customers' report of their own experience tends continually to bring new customers to the same concern, there has been produced an element of value quite as important—in some cases, perhaps, far more important than the plant or machinery with which the business is carried on. That it is 'property' is abundantly settled by authority, and, indeed, is not disputed. That in some cases it may be very valuable property is manifest. The individual who has created it by years of hard work and fair business dealing usually experiences no

difficulty in finding men willing to pay him for it, if he be willing to sell it to them. * * * And so long as it remains salable
414 it is valuable, nor is it indissolubly connected with any particular locality or any specific tangible property."

In Metropolitan Bank vs. St. Louis Dispatch Co. (149 U. S. 436), the court said at page 446:

"As applied to a newspaper, the good will usually attaches to its name rather than to the place of publication. The probability of the title continuing to attract custom in the way of circulation and advertising patronage gives a value which may be protected and disposed of, and constitutes property."

Other authorities to the same effect are: People v. Dedenick (161 N. Y. 195, 210); Boon v. Moss (70 N. Y. 465); Piggly-Wiggly Corporation v. Saunders (1 F. (2d) 572, 580); Coca Cola Bottling Co. v. Coca Cola Co. (269 Fed. 796, 805); George G. Fox Co. v. Glynn (191 Mass. 344); Esseltyn v. Holmes (42 Mont. 507).

In Haugen v. Sundseth (118 Northwestern Reporter), at page 606, it was said:

"The good will of the business is the favor from the public and the probability that old customers will continue their patronage. It is an advantage and benefit that is acquired by business establishments beyond the value of the money or property invested
415 therein, and is 'property' in the legal sense of the term, and subject to sale and transfer in conjunction with the sale of the business precisely as other personality."

In various places in the revenue act of 1919 where the term "property" is used, it apparently includes good will, trade-marks, and other names. This is provided for excess-profits tax purposes in section 325 (a) of said act, and the term "property" as used in section 202 referring to the gain or loss from the sale of property must include good will and trade names. [See article 41 Treasury Regulations 45, 1920 edition.] Good will and similar assets must be "property" under section 402 of the revenue act of 1918, providing for the determination of the gross estate of a decedent. [See article 13, Treasury Regulations 68.]

In some instances where the Bureau of Internal Revenue denied applications for obsolescence of good will, such denials were placed upon the ground that the good will in question was personal to the taxpayer, and, therefore, had no assignable value. Such is not the present case.

The fact that good will ordinarily exists and is transferred in connection with a good business does not remove it from consideration as property subject to obsolescence. Representing as it does essentially the established earning power of a particular business

good will usually is an essential part of that business, but it
416 is nevertheless property distinct from the physical assets of the business. (Washburn v. National Paper Co., 81 Federal 1.)

There is nothing in the inherent nature of good will to prevent its obsolescence or destruction. Not every business has a good will and a business which has a good will may lose it. Not every business has an established earning power, and not every business can maintain an established earning power in the face of changed legal or economic conditions. A business which has no earning power and has no reasonable prospect of establishing such an earning power has no good will, no matter how long it has been established, or how well known its name may be.

There may, therefore, under a proper state of facts be obsolescence of good will, i. e., conditions may so change as to indicate that at a reasonably future date the established good will of a business will have no remaining value.

The case of Hart v. Smith (64 Northeastern 661) and Commonwealth v. Kentucky Distillery Co. (132 Ky. 521), cited by the defendant are opposed to the weight of authority. The decision in the Hart case was largely influenced by a misconception and a misquotation from the earlier Indiana case of Rawson v. Pratt (91 Ind., 9 (see 16 Harvard Law Review, 135).)

The Kentucky case turned to a large extent upon a long
417 standing administrative construction of the statute thereunder consideration. In the case of Rew Wing Malting Co. v. Willcuts, it is apparent that the learned judge, who decided the case, had an erroneous impression of the established practice of the Bureau of Internal Revenue. In limiting the term "property" as used in section 234 (a) (7) to tangible property, the decision was in error and the further statement of the court, without citation of authority, that good will simply makes the plant more valuable and, therefore, is not property used in the business can not be accepted as sound.

It is my conclusion, therefor, that good will is property used in the business within the meaning of section 234 (a) (7) of the revenue act of 1918.

The defendant contends however, that the provision for a deduction for obsolescence refers only to property which is also subject to exhaustion, wear, and tear. The language used is "a reasonable allowance for the exhaustion, wear, and tear of property used in the business, including a reasonable allowance for obsolescence." In my judgment, the use of the word "including" does not limit the

deduction for obsolescence. If the deduction for exhaustion, wear, and tear, in fact, included that for obsolescence, it would have been unnecessary to add the phrase "including a reasonable allowance for obsolescence." Obviously, the purpose of this phrase was
418 to allow a new and additional deduction. The word "including" operates here, I think, as it usually does, not to define what goes before, but to cover something new and additional. (31 Corpus Juris 395.) The statute thus provides for a deduction for obsolescence of all property used in the business, and does not limit it to property which is also subject to exhaustion, wear, and tear.

Land is not subject to exhaustion, wear, and tear because ordinarily it has indefinite existence and value. The same is true of good will. If, due to some change in conditions, the useful life of these assets becomes limited, it is difficult to see why in such a case the statute does not permit the deduction of a reasonable allowance for obsolescence. The Bureau of Internal Revenue reached this conclusion as to land used for vineyards in Solicitors Law Opinion, 863, published in the Treasury Department Cumulative Bulletin for 1919, page 127, and as to good will of distillers in Advisory Tax Board Recommendation, 44, published in Treasury Department Cumulative Bulletin for 1919, at page 133. Concededly, obsolescence may be claimed with respect to a building, if its remaining physical life of say, thirty years, is reduced to a useful life of three years due to some change in conditions. There would seem to be equal basis in the statute and in equity for allowing obsolescence with respect to land or good will if its indefinite useful life is reduced to a useful life of two years. In aiding the provision for the deduction for obsolescence, Congress has expressed no inten-
419 tion of excluding from consideration property which originally had an indefinite useful life. In reaching this conclusion upon the law, the deductions of the Commissioners of Internal Revenue have not necessarily been regarded as binding, but the executive construction of the statute made in 1919, shortly after the passage of the act and following in published rulings since, and apparently applied in the settlement of many cases, supports the conclusion. Such a construction of the statute even where unfavorable to the Government, should not be lightly disturbed. (U. S. v. Hill, 120 U. S., 169; U. S. v. Phillbrick, 120 U. S., 52; Robertson v. Downing, 127 U. S., 607; see Baltzell v. Mitchell, 3 F. (second) 428.) There is, of course, involved here no question of compensation for property destroyed by the exercise of power under the eighteenth amendment. The sole question is the determination of the taxable net income. There is nothing in the statute to suggest that the deduction for obsolescence does not include obsolescence as

the result of an exercise of the legislative powers of the States or the Nation. The brewery business was lawful and its obsolescence was not the result of any illegal act upon the part of the plaintiff.

The basis for determining the reasonable allowance for obsolescence in the case of property acquired prior to March, 1913, is the value of such property on that date, which was approximately the date
420 of the adoption of the income tax amendment. This is a basis applied by the Commissioner of Internal Revenue and approved by the courts. (Article 164, Treasury Regulations 45, Philip Henrici Company v. Reinecks 3 F. (2d) 34; Kentucky Tobacco Products Company v. Lucas 5 F. (2d) 725.)

Concededly, the obsolescence period over which the deduction should be spread is January 31, 1918, to January 16, 1920, the period fixed in Advisory Tax Board Recommendation 44. Apparently the date, January 31, 1918, was selected as the earliest date on which an impartial observer would have concluded that the prohibition amendment would be adopted and the brewery business destroyed. Shortly before that time, both Houses of Congress had adopted the prohibition amendment by overwhelming majorities and during January, 1918, it had received very favorable consideration from the State legislatures then in session. The amendment could not, however, possibly be adopted by a sufficient number of States until January, 1919, because many of the legislatures would not be in session until that time, and the amendment by its terms could not become operative until one year after its adoption. The amendment was adopted by the requisite number of States of January 15, 1919, and became effective January 16, 1920. This period is reasonable and not unduly favorable to the plaintiff since it was, in fact, compelled to
421 cease business as early as October, 1919, due to the adoption of war time prohibition.

Plaintiff is entitled, therefore, to a deduction from income of the fiscal year 1919 of a proportionate part (365/715ths) of the value of its good will on March 1, 1913, provided, of course, that such good will was destroyed by prohibition legislation and thus rendered obsolete.

In reaching the value of the plaintiff's good will as of March 1, 1913, I have been guided by the net-earnings rule. The valuation shown by that rule is strongly supported by the general evidence in the case. In applying this rule, I am allowing a return of six per cent on the company's investment and capitalizing the excess earning on a 12½% basis to get the good-will value. Upon this basis I find that the value of the plaintiff's good will on March 1, 1913, was not less than $174,482.64. The percentage used is substantiated by the only evidence introduced on the question and appears to me

to be reasonable. The return of 6% on the company's investment is the legal rate customarily used in New York in valuing franchises of corporations by the net-earnings rule, and is the rate customarily used in valuing good will for transfer tax purposes. People v. State Board of Tax Commissioners, 212 N. Y. 472; Matter of Felton, 121 Misc. 53.

In 1913 the plaintiff's business was stable, well established, had a good market for its product, and was less subject to ordinary
422 business vicissitude than that of most manufacturing companies. The business was confined largely to Syracuse and vicinity, and was in no appreciable danger of injury from local opposition or State prohibition. A return of 6% on safe investments in 1913 was a favorable return, and an investment in this business at that time was a safe investment.

The use of the 12½% basis for capitalizing the excess earnings also seems a fair rate. This requires a return on the intangible assets of more than twice the return allowed on the tangible assets, being the proportion suggested by the Government for comparing such valuation. The stable character of the business justifies a favorable rate of capitalization. It had valuable trade names and controlled licenses in saloon properties, all supporting its good will. There is some evidence in the record that 10% would be a proper basis of capitalization. I feel that on the basis of facts known in 1913 the good will of this business sold for the sum mentioned would have been a good investment.

The plaintiff's good will was destroyed by national prohibition. Its earnings continued as long as it could sell its product, to October, 1919. After that it was not able to earn any net income and went into liquidation in December, 1920. It is true that it undertook a new business venture—the manufacture and sale of soft drinks and cereal beverages containing less than one-half of one per cent
423 of alcohol—but this too was unsuccessful and the new business had no good will. Good will is a purely imaginary quality in a business which loses money year after year, and it seems contrary to the facts to hold that its good will continued in the new business which was carried on without any profits.

The plaintiff was, therefore, entitled to deduct from the income of the fiscal year, ending May 31, 1919, as a reasonable allowance for the obsolescence of its good will an amount equivalent to 365/715ths of $174,482.64. Such a deduction exceeds the deduction claimed in the claim for refund and entitles the plaintiff to full recovery for the amount claimed for the fiscal year 1919.

The plaintiff, as a further basis for its action, claims obsolescence of its assignments, agreements, and powers of attorneys, over liquor

tax certificates issued under chapter 112 of the laws of New York for the year 1896 and the acts amendatory thereof. These certificates were property, Niles v. Mathusa, 162 N. Y. 546. They were tran'ferable and controllable by powers of attorney. McNealy v. Weiz, 166 N. Y. 124. They were renewable annually upon the payment of the prescribed licence fee. The virtual ownership of these certificates, which carried with them the continuing control of locations for the sale of the products of the plaintiff, supplemented and supported the good-will value of the plaintiff, and the existence of these liquor tax certificates is one of the facts indicating that the
424 value for good will resulting from the application of the net earnings rule is reasonable. The evidence shows that these liquor tax certificates had a substantial value and that the plaintiff continued to own them, or the renewals thereof, until the advent of national prohibition.

It cannot be doubted that there value was wholly destroyed by prohibition legislation. The plaintiff claims that the ownership of these certificates can be regarded separately as an alternative basis for upholding the plaintiff's claim. With this view I am not in accord. The claim in this regard was, I think, properly presented, but the main question litigated on the trial was that of obsolescence of good will, and evidence of obsolescence of other property was received only as bearing on that question. There has, therefore, been presented to me no proof which would justify a finding that the value of these certificates should be considered separate and apart from the good will of the corporation.

The plaintiff also claims obsolescence of its National plant as an additional basis for its claim. This plant was of no use after prohibition came, and with its vats, casks, fixtures, machinery, etc., especially adapted for the manufacture of its product, as a whole, became obsolete within the meaning of the statute. While, of course, to render the plant obsolete, there had to be more than a mere impairment of value, yet the fact that property has a nominal
425 or scrap value remaining does not take it out of the class of obsolete property. When it is borne in mind that the residue value of this plant of $50,000.00 includes land costing over $20,000.00 as well as the building, and that $60,000.00 was expended to make it fit for a cold-storage plant, it is clear that as compared with its cost only a nominal value for the building remained.

However, evidence concerning it was introduced and received only in support of plaintiff's claim for obsolescence of good will, and for that reason I am satisfied that it does not furnish plaintiff with a proper basis for recovery in this action.

At the opening of the trial, a motion was made by defendant to dismiss the complaint, and evidence was received at various times

throughout the trial and objected to by the defendant and objection overruled, with the right to the defendant to move to strike out the answers at any time.

For the reasons expressed in this opinion, the motion to dismiss is denied, motions to strike out evidence are denied, and objections overruled."

10. That the law of this case as stated said referees' opinion is supported by the facts in this case and the court erred in not granting plaintiff judgment thereon as directed by said referee.

11. That plaintiff was entitled to an allowance for the obsolescence of the good will of its business on account of national prohibi-
426 tion in the amount found by said referee and the court erred in not granting same and plaintiff judgment on account thereof.

12. That said referee and court erred in not finding and holding that said plaintiff was entitled to an obsolescence $223,305.83 on its National Brewery plant buildings as requested by said plaintiff.

13. That said referee and court erred in not finding and holding that plaintiff was entitled to an obsolescence of its machinery and fixtures in its National plant of $92,966.48 due to national prohibition legislation as requested by plaintiff.

14. That said referee and court erred in not finding and holding that said plaintiff was entitled to a deduction of $167,582.68 on account of the obsolescence of its National plant machinery and fixtures as requested by plaintiff.

15. That said referee and court erred in not finding and holding that said plaintiff was entitled to a deduction of at least $165,909.09 on account of the obsolescence of its agreements, assignments, and powers of attorneys over liquor tax certificates as requested by plaintiff.

That the court wrote an opinion in denying plaintiff's application for judgment on said referee's findings which has been filed and is as follows:

427 United States District Court, Northern District of New York

THE HABERLE-CRYSTAL SPRING BREWING COMPANY,

vs.

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE.

Welch & Welch, attorneys for plaintiff, Syracuse, N. Y. Oliver D. Burden, United States attorney, Syracuse, N. Y.; H. V. S. Groesbeck, assit. U. S. atty.; Floyd F. Toomey, Solicitor, Treasury Dept., Wash-

ington, D. C.; Frank B. Hudson, inspector, 21st Dist., N. Y.; A. W. Gregg, Solicitor of Internal Revenue, for defendant.

COOPER, J.:

This is a motion for confirmation of the report of the special master to whom the trial of the issues involved was referred by consent of the parties to take the proof and report his findings of fact and conclusions of law, subject to the approval of the court.

The plaintiff brought this action against the collector to recover income profits taxes in the sum of $15,530.92, paid for the fiscal year ending May 31, 1919, together with $1,037.16 interest, all of which plaintiff claims was illegally exacted from it because of the failure of the collector to allow a deduction from the plaintiff's in-
428 come for that year for obsolescence of the good will of the plaintiff's business during that year.

Prior to prohibition plaintiff was conducting a brewing business in central New York, with two brewing plants located in the city of Syracuse, in which business it made substantial profits by the sale of its products under certain trade names filed in the office of the secretary of state of New York. The plaintiff corporation was dissolved in December, 1920, with the coming in of prohibition, and another corporation known as the Haberle Beverage and Products Company was organized in 1920, which took over one of the two brewing plants, called the Haberle plant, and engaged in the business of manufacturing and selling soft drinks and cereal beverages and is still carrying on the same business at the Haberle plant. With one exception, the stockholders of the new corporation are identical with the stockholders of the plaintiff corporation.

On the trial before the special master, the defendant contended (1) that the plaintiff was without legal capacity to sue, having been dissolved pursuant to the statutes of the State of New York; (2) that good will is not property that is taxable separate and apart from the business to which it is an appurtenance; (3) that even if good will is property, it is not the kind of property meant by section 234-A, subdivision 7 of the Revised Statutes as the same was amended in 1918, which statute is conceded to govern the case at bar.
429 The special master found in favor of the plaintiff on all these grounds and found a judgment in favor of the plaintiff for the full amount of the claim.

Inasmuch as this court refuses to confirm the report of the special master and finds that the plaintiff's complaint should be dismissed, because the court disagrees with the special master and upholds the defendant's third contention above stated, this memorandum will not discuss the defendant's contentions 1 and 2 above set forth. Section 234-A of the Revised Statutes reads in part as follows:

"that in computing the net income of the corporation subject to the tax imposed by section 230 there shall be allowed as deductions * * * (7) a reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

The special master construed this section to cover obsolescence of good will and held that the collector of internal revenue should have allowed the plaintiff a deduction from its income for the year in question for obsolescences of good will in an amount which would entitle the plaintiff to the return of taxes illegally paid to the full amount claimed by the plaintiff with interest.

The case was carefully tried by the special master, and his opinion and findings indicate careful study of the facts and the law.
430 His decision is based upon the construction of the statute, which includes obsolescence of good will as covered by the words "including a reasonable allowance for obsolescence." He construes these words of subdivision 7 as covering an allowance in addition to and of another kind than "a reasonable allowance for exhaustion, wear, and tear on property used in the trade or business." In this respect he seems to be in error and to have extended the meaning of the words "including a reasonable allowance for obsolescence" beyond the scope of meaning which Congress intended.

This very question and the construction of subdivision 7 in respect to these same words have been very carefully considered by the Circuit Court in the 8th Circuit in the case of the Red Wing Malting Company vs. Williams, cited at the September term, 1926, and reported in 15 Fed. (2nd) 626. The U. S. Supreme Court denied certiorari in this case on March 21, 1927 (272 U. S.).

The circuit court there held in substance that the obsolescence intended to be designated by subdivision 7 could only mean obsolescence of property used in the trade or business, which was subject to exhaustion, wear, and tear and could not include any property not subject to exhaustion, wear, and tear, and therefore could not include good will or obsolescence of the good will.

Though not bound thereby, this court fully agrees with the decision in the Red Wing Case and therefore must refuse to confirm
431 the report of the special master and must dismiss the complaint as the special master's decision is based entirely on the contrary construction of this statute.

Judge Kerrigan, of the Northern District of California, Southern Division, in the case of Lansberger vs. McLaughlin, not yet reported, has also construed this statute as in the Red Wing Case, supra, and there seem to be no contrary decisions.

The plaintiff excepted to the special master's findings of fact 42 to 47, inclusive, and to the conclusions of law 5 to 7, inclusive. These

findings of fact and conclusions of law were that the National plant (one of the plaintiff's two brewery plants), including its machinery and fixtures, decreased a large sum in value due to obsolescence and that certain liquor tax certificates with powers of attorney and notices to issuing officers also decreased a large sum in value due to obsolescence, but that that evidence relating to such things was offered by plaintiff and received in evidence only upon the question of obsolescence of good will or intangible assets and that the plaintiff was not entitled to any allowance or independent deductions on account thereof.

The record clearly shows that this evidence was offered and received only for its alleged probative force upon the plaintiff's claim that it was entitled to allowance for obsolescence of good will.

On pages 219 and 220 of the record plaintiff's attorney said, referring to this evidence, "it is offered upon the question of obsolescence of good will and intangible assets."

432 The special master's rulings in such mentioned findings of fact and conclusions of law were clearly right and plaintiff's exceptions are not well taken.

This case having been brought because of disallowance by the Government of plaintiff's claim for obsolescence of good will, which the department had apparently formerly allowed, the question of an independent allowance or deduction because of obsolescence of the brewery plant or other real estate or liquor tax certificates is not in the case and not decided.

The defendant prevailing on the law in this case, it is not necessary to examine the defendant's exceptions to the specific findings of fact and conclusions of law.

Judgment may be entered in accordance with this decision.

16. That the court erred in stating the law of this case in its said opinion, and that the law as stated in said opinion by the court is not applicable to the facts in this case.

17. That the legal authorities cited by the court in its said opinion are not applicable to the facts in this case.

18. That said referee having been appointed upon the consent and written stipulation of all the parties to this case to hear and determine all the issues in this case the court had no jurisdiction and erred in granting defendant judgment dismissing plaintiff's complaint.

433 19. The court erred in not granting plaintiff judgment as directed by said referee and if defendant felt aggrieved thereby his remedy would be an appeal from such judgment.

20. That on the undisputed facts in this case and on the law applicable thereto the court erred in not making the necessary and proper

findings of fact and conclusions of law as plaintiff requested said referee to make upon the trial had before him and grant plaintiff judgment against defendant for the amount directed by said referee in his said findings.

Wherefore the plaintiff and plaintiff-in-error, the Haberle Crystal Spring Brewery Company, prays that the judgment of said court be reversed and that said plaintiff have judgment as directed by said referee and for such other and further relief as to the court may seem proper.

Dated January 12, 1928.

WELCH & WELCH,
Attorneys for Plaintiff-Plaintiff in error,
706 City Bank Bldg., Syracuse, N. Y.

Read on application for writ of error the 14 day of January, 1928.

FRANK COOPER,
United States District Judge for the
Northern District of New York.

434 [File indorsement omitted.]

[Supersedeas bond on appeal for $2,500 approved and filed Jan. 20, 1928, omitted in printing.]

440 [Citation in usual form showing service on B. F. Tompkins omitted in printing.]

441 In United States Circuit Court of Appeals, Second Circuit

THE HABERLE-CRYSTAL SPRING BREWING COMPANY, PLAINTIFF IN ERROR

vs.

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE 21ST District, New York, defendant in error

Order extending term

442 Error to the District Court of the United States of America, within and for the Northern District of New York, in the following entitled cause, to wit:

[Title omitted.]

On application of the original plaintiff and plaintiff in error in the above case, and upon stipulation of counsel for said defendant in error and for good cause shown, it is

Ordered that the term of the United States District Court for the Northern District of New York held at Utica, N. Y., on November

28, 1927, and extended to and including January 27, 1928, by the order of said court dated that day for the purposes specified in said order, be and the same is hereby extended to May 1, 1928.

Dated, January 21st, 1928.

FRANK COOPER,
Judge of the United States District Court for the said Northern District of New York.

443 It is hereby stipulated and agreed that the above order may be signed and entered herein.

Dated, January 20, 1928.

WELCH & WELCH,
Attorneys for the Haberle Crystal Springs Brewing Company.
B. F. TOMPKINS,
Asst. U. S. Attorney for said Defendant in Error.

In United States Circuit Court of Appeals

[Title omitted.]

Error to the District Court of the United States of America within and for the Northern District of New York, in the following entitled cause, to wit:

444 [Title omitted.]

Order Extending Time

On application of the original plaintiff and plaintiff in error, in the above case, and upon stipulation of counsel for said defendant in error and for good cause shown, it is

Ordered, that the time of the said original plaintiff (plaintiff in error) herein for docketing this cause and printing and filing the record with the clerk of the said Circuit Court of Appeals for the Second Circuit and for settling and filing bills of exceptions be and is hereby enlarged and extended to and including July 2, 1928, and it is further

Ordered, that the term of the United States District Court for the Northern District of New York held at Utica, N. Y., on November 28, 1927, and extended by orders to June 1, 1928, for the purposes specified in said orders, be and the same is hereby extended to July 2, 1928.

Dated May 28, 1928.

FRANK COOPER,
Judge of the United States District Court for the said Northern District of New York.

445 It is hereby stipulated and agreed that the above order may be signed and entered herein.

Dated May 25, 1928.

WELCH & WELCH,
Attorneys for Plaintiff in Error.
OLIVER D. BURDEN,
U. S. Attorney for Defendant in Error.
Per B. F. T.

In United States District Court

[Title omitted.]

Defendant's Exceptions to Referee's Findings

To the clerk of the said District Court of the United States of America, within and for the Northern District of New York, and to Messrs. Welch & Welch, attorneys for the above-named plaintiff, the Haberle Crystal Springs Brewing Company:

446 Please take notice that the above-named defendant, Jesse W. Clarke, collector of internal revenue for the 21st District of New York, excepts to the findings of fact of the referee, Honorable James J. Barrett, made under the order of this above-named court, wherein the action above entitled is pending, dated, and entered on the 5th day of May, A. D. 1925, which said findings of fact were made on the 13th day of January, A. D. 1926, and were thereafter filed and entered in the office of the said clerk of this above-named United States District Court for the Northern District of New York and which were served upon the attorney for said defendant, on the 15th day of January, A. D. 1926, said exceptions, now here made, being as follows, to wit:

I. Said defendant excepts to the finding of fact contained in paragraph numbered and designated 2, on the ground that there is not sufficient evidence to support the said finding, as to the voluntary dissolution of the said plaintiff; and that said finding is contrary to the evidence.

II. Said defendant excepts to so much of the finding of fact numbered and designated 6, as includes the words "and interest" at the end and close of said finding, on the ground that there is not sufficient evidence to support the same, and that the same is contrary to the evidence.

III. Said defendant excepts to so much of the finding of fact contained in paragraph numbered and designated 7 as contains the words:

447 "It was not claimed specifically in said return that plaintiff was entitled to a deduction from gross income on account of obsolescence of good will,"
on the ground that the following words requested and asked by defendant should have been used in line thereof, to wit:

"No deduction from gross income was taken or claimed in said return on account of obsolescence of good will or of tangible assets."

IV. Said defendant excepts to so much of the finding of fact contained in paragraph numbered and designated 14, as includes the net assets of plaintiff at any time, and particularly for the year 1912, or that part thereof from March 1, to May 31, and which excludes the year 1907.

V. Defendant excepts to each and every part and portion contained in finding of fact numbered and designated 15, on the ground that the same was based upon immaterial, insufficient and incompetent evidence as to obsolescence of good will, not allowed by act of Congress or by the pleadings in this cause and action.

VI. Defendant excepts to each and every part contained in paragraph numbered and designated 16 on the ground that the same is based upon immaterial, insufficient and incompetent evidence, and because the claim of the plaintiff cannot be based on obsolescence of good will, and was not so made in its income-tax return and before the proper officers of the Bureau of Internal Revenue.

448 VII. Defendant excepts to so much of the finding of fact contained and designated in paragraph 17, as is stated and recited therein in the following words, to wit:

"The Commissioner of Internal Revenue has decided that by January 31, 1918, it became reasonably apparent that National Prohibition would be adopted,"
on the ground that such decision is now shown by any sufficient evidence, and even if it were, that it was not binding or conclusive on said referee and is not binding and conclusive on this court:

And defendant also excepts to so much of said paragraph last aforesaid as stated that:

"The deduction for obsolescence of good will in the fiscal year, 1919, on this basis is $90,091.55"
as not shown by competent and sufficient evidence, and because such obsolescence of good will is not allowed by act of Congress, nor under the pleadings of said cause, and because said plaintiff has claimed the same only on real estate and property, and only for the alleged loss of good will on the same.

VIII. Defendant also excepts to each and every part of the finding of fact numbered and designated 18, on the ground that the reference

therein contained to finding No. 11 therein has no bearing on the matter contained in said finding 18, and because the same is incompetent, irrelevant and immaterial for the reasons set forth
449 in the objections to finding 17, and further because there was shown to be no diminution in the net income for the years 1918 and 1919 and other prior fiscal years of said plaintiff.

IX. Defendant excepts to the finding contained in paragraph numbered and designated 19, on the ground that the same is irrelevant and not responsive to the issues in this cause, inasmuch as losses must be computed on the basis of incomes for the year in which the losses occur.

X. Said defendant excepts to the finding contained in paragraph 20, on the ground that the same is immaterial, irresponsive to the issues and pleadings in this cause and action, and upon the further ground that the losses of plaintiff in sales of soft drinks and cereal beverages, after May 31, 1919, can not be used in any deduction on the income of prior years, or of the year ending on such date.

XI. Defendant further excepts to so much of the finding contained in paragraph numbered and designated 21, as is contained in the closing paragraph and sentences thereof stated and recited in the following words, to wit:

"The volume of business at these two plants was substantially equal, and the annual net income derived from the operations of each plant was substantially the same,"

on the ground that such portions of said finding are immaterial, incompetent and irrelevant under the pleadings and issues of this cause.

450 XII. Said defendant further excepts to all of the finding contained in paragraph numbered 28 for the reason and upon the ground that the same has no materiality, relevancy, or competency under the issues in this cause and refers to operations of said plaintiff after the income tax for said year ending May 31, 1919, was due and payable, and no losses can be wholly or partly apportioned to said year.

XIII. Said defendant further excepts to the findings contained in paragraph numbered and designated 28 on the ground that the matters therein contained have no relevancy and materiality to the issues of this cause, and for that such losses can not be apportioned wholly or partially to said year ending May 31, 1919.

XIV. Said defendant further excepts to so much of the finding contained in paragraph numbered and designated 27, as is set forth in the following words at the close thereof, to wit:

"These trade names were widely advertised and well known in Syracuse and surrounding territory before and during 1913, and had a substantial value on March 1, 1913,"

on the ground that obsolescences of good will were never properly claimed by said plaintiff, in its income-tax return as before the proper officers of the Bureau of Internal Revenue, and because the same are incompetent, immaterial, and irrelevant under the issues of this cause and action.

451 XV. Said defendant further excepts to all of the finding of fact numbered and designated 28 on the ground that the same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action, and that any losses occurring to plaintiff after May 31, 1919, cannot be wholly or partially apportioned to its fiscal year ending May 31, 1919.

XVI. Said defendant also excepts to all of the finding numbered and designated 29 on the ground that same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

XVII. Defendant also excepts to all of the finding numbered and designated 30 on the ground that the same is incompetent, immaterial, and irrelevant under the issues in this cause and action.

XVIII. Said defendant also excepts to all of finding numbered and designated 31 on the ground that the same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

XIX. Said defendant also excepts to all of the finding numbered and designated 32 on the ground that the same is incompetent, immaterial, and irrelevant under the issues of this cause and action.

XX. Said defendant *t*lso excepts to all of the finding numbered and designated 33 on the ground that the same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

452 XXI. Said defendant also excepts to all of the finding numbered and designated 34 on the ground that the same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

XXII. Said defendant also excepts to all of the finding numbered and designated 35 on the ground that the same is incompetent, irrelevant, and immaterial under the issues of this cause and action.

XXIII. Said defendant also excepts to all of the finding numbered and designated 36 on the ground that the same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

XXIV. Said defendant also excepts to the finding numbered and designated 37 on the ground that the same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

XXV. Said defendant also excepts to the finding numbered and designated 38 on the ground that the same is incompetent, irrelevant, and immaterial under the pleadings and issues in this cause and action; and further, because the losses or obsolescence occurring after May 31, 1919, the end of the fiscal income tax year of plaintiff, cannot be apportioned wholly or partially to said fiscal year.

XXVI. Said defendant also excepts to all of the finding
453 numbered and designated 39 on the ground that the same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

XXVII. Said defendant also excepts to all of the finding numbered and designated 40 on the ground that the same is incompetent, immaterial, and irrelevant under the issues in this cause and action; and further, because prohibition was not effective until January 16, 1920, and any losses occurring to plaintiff after its said income tax fiscal year ending May 31, 1919, can not be wholly or partially apportioned to said fiscal year.

XXVIII. Said defendant also excepts to all of the finding numbered and designated 41 on the ground that any losses occurring to plaintiff at the end of its said income tax fiscal year could not wholly or partly be apportioned to said year, and because the said finding is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

XXIX. Said defendant also excepts to all of the finding numbered and designated 42 on the ground that the obsolescence claimed by plaintiff was not for loss of good will of its business, but merely for the obsolescence of its real property and improvements as disclosed and shown by its income tax return, its complaint, and the schedule of its real property and improvements attached thereto and made a part thereof; and that no claim was ever presented to the Commissioner of Internal Revenue making such a claim as is
454 recognized by said findings; and further, because said finding is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

XXX. Said defendant also excepts to all of the finding numbered and designated 43 on the ground that the same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action; and further, because the evidence relating to the same ought not to have been received by the said referee even on the question of the obsolescence of good will, which is not and was not, under the act of Congress relating to income taxes in force in the fiscal income tax year of plaintiff, a ground for reduction of allowance to plaintiff, and because no such claim was ever presented to the Commissioner of the Internal Revenue or other proper authori-

ties; and further because said evidence was incompetent, immaterial, and irrelevant under the pleading and issues in this cause and action.

XXXI. Said plaintiff also excepts to all of the finding numbered and designated 44 on the ground that the evidence therein mentioned ought not to have been received because the same was incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action; and further because the same could not be lawfully considered as evidence of obsolescence of good will.

XXXII. Said defendant also excepts to all of the finding
455 numbered and designated 45 on the ground that the evidence received on the question of obsolescence of good will ought not to have been received because the same was not warranted by said act of Congress, nor upon any claim made by plaintiff, in its income tax return, or before said Commissioner of the Internal Revenue, and because the same was and is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

XXXIII. Said defendant also excepts to all of the findings numbered and designated 46 on the ground that the same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action.

XXXIV. Said defendant also excepts to all of the finding numbered and designated 47 on the ground that the instruments and liquor licenses therein, and in said paragraph 46 mentioned, are incompetent, immaterial, and irrelevant under the pleadings and issues in this cause, and should not have been received in evidence upon the question of obsolescence or for any purpose whatsoever.

XXXV. Said defendant also excepts to all of the finding numbered and designated 48 on the ground that the same is incompetent, immaterial, and irrelevant under the pleadings and issues in this cause and action, and because at no time could it have been believed that the adoption of national prohibition amendment, being
456 the eighteenth amendment to the constitution of the United States of America, could have been foreseen during the progress of its ratification by the several States thereof, or by their legislatures, when it is a matter of current history that the popular belief at the time of the submission of said amendment was that the legislatures of thirteen States at least would not ratify said amendment, thereby defeating the same.

XXXVI. That under section 234 (a) of the revenue act of Congress of 1918, commonly so-called, the term therein "including a reasonable allowance for obsolescence" refers to exhaustion, wear, and tear of property used in the trade and business, and has no reference to obsolescence of good will of any business; and that therefore all of said findings of said referee allowing obsolescence for the good

will of the business of plaintiff are without warrant of law and are illegal, unwarranted, and void.

XXXVII. The said plaintiff has never presented in apt time and in proper manner its claim for obsolescences for any or on account of any matter whatsoever to the proper authorities of the United States of America, before the commencement of this suit, as it was by act of Congress and by the lawful regulations of the Treasury Department and Bureau of Internal Revenue required to do.

XXXVIII. That the amended complaint of plaintiff does
457 not make any claim for obsolescence of good will, except such as is based solely upon the alleged obsolescence and depreciation of its real property, as shown by its complaint and the schedule thereto attached showing the values and the alleged depreciation thereof, and that such claim under the findings of said referee can not be allowed.

XXXIX. The said findings of the said referee in favor of the plaintiff are based either upon insufficient evidence or upon no evidence whatever.

XL. Said referee erred because he should have found for the defendant collector of internal revenue instead of for said plaintiff.

XLI. The said referee should have found as requested in the 7th finding of fact for defendant, as follows, to wit:

"No deduction from gross income was taken or claimed in said return on account of obsolescences of good will or of tangible assets," instead of the following in the finding of fact of said referee numbered and designated 7 as follows:

"It was not claimed specifically in said return that plaintiff was entitled to a deduction from gross income on account of obsolescence of good will,"

and that even in said finding 7 of said referee, said plaintiff could
458 not recover as it did not specifically claim in its said income tax return that it was entitled to a deduction from gross income on account of obsolescence of good will.

XLII. The said referee erred in not finding, as requested by defendant in its finding of fact designated 6, as follows, to wit:

"That on November 19, 1922, plaintiff duly filed a claim in which it claimed a refund of taxes paid for the fiscal year ending May 31, 1919, in the sum of $15,530.92; that said claim for refund was predicated solely upon its alleged right to deduct from its gross income for said year a reasonable allowance for obsolescence of good will. That said claim for refund was denied by the Commissioner of Internal Revenue on July 16, 1923."

XLIII. Said referee erred in not finding, as requested in the finding of fact of defendant designated 12, as follows, to wit:

"The special master (referee) finds that the 'National plant' was not rendered obsolete by prohibition legislation."

XLIV. Said referee erred in not finding, as requested by defendant in his finding of fact designated 14, as follows:

"From 1904 until October 29, 1919, plaintiff advertised and marketed its products under the name of 'Congress Beer' and 'Derby Cream Ale.' On August 7, 1913, these names were duly filed as trade marks with the secretary of state of New York. (Ex. 19, Min. p. 256.)"

459 XLV. The said referee erred in not finding as requested by defendant in his finding of fact numbered and designated 15, as follows, to wit:

"In connection with its business the plaintiff owned various pieces of property more specifically referred to and described in Schedule B attached to complaint. (Min., p. 124.) These were licensed saloon properties controlled by plaintiff and in which the products were exclusively sold."

XLVI. Said referee erred in not finding, as requested by defendant in his finding of fact designated 16, as follows, to wit:

"Prior to March 1, 1913, plaintiff owned or controlled certain New York State liquor licenses (Min., p. 253), covering the right to engage in the sale of liquor in certain designated premises. These licenses were issued annually. (Min., pp. 244–245.) On Mar. 1, 1913, plaintiff owned or controlled 130 liquor licenses. (Min., p. 238.) Any licenses owned or controlled by the plaintiff on October 29, 1919, were not the same licenses which it had owned or controlled on March 1, 1913."

XLVII. Said referee erred in not finding, as requested by defendant in his finding of fact numbered and designated 17, as follows, to wit:

"The tangible net worth of the plaintiff as of the beginning of each of the five fiscal years prior to March 1, 1913, was as follows:

460

As at—	Net worth
June 1, 1907	$1,397,121.36
June 1, 1908	1,461,492.47
June 1, 1909	1,523,706.08
June 1, 1910	1,552,324.44
June 1, 1911	1,619,155.83

The net income for each of the five fiscal years ending prior to March 1, 1913, was as follows:

Net income	For fiscal year ending—
$112,371.11	May 31, 1908
110,803.81	May 31, 1909
122,998.19	May 31, 1910
130,831.39	May 31, 1911
100,664.37	May 31, 1912

"The average tangible net worth of the plaintiff company as of the beginning of each of the five fiscal years prior to March 1, 1913, was $1,510,760.04. The average net income for each of the five fiscal years ending prior to March 1, 1913, was $115,533.77."

XLVIII. Said referee erred in not finding, as requested by defendant in his finding of fact numbered and designated 18, as follows, to wit:

"The special master (referee) finds that any liquor licenses owned or controlled by the plaintiff prior to, on, or after March 1, 1913, were used in its business for the sole purpose of assisting it in marketing its products and of producing earnings. (Min., 461 p. 108.) That such licenses or powers of attorney controlling the same constituted a part of the intangible assets of the plaintiff. (Min., p. 97.) That these licenses are in evidence in this case only upon the question of obsolescence of intangible assets (Min., p. 239), and that the value thereof, if any, to the plaintiff on March 1, 1913, is reflected in its earnings for the five prior years."

XLIX. Said referee erred in not finding, as requested by defendant in his finding of fact numbered and designated 19, as follows, to wit:

"The special master (referee) finds that there is no evidence to support the finding that the good will of the plaintiff had any value on March 1, 1913."

L. Said referee erred in not finding, as requested by defendant in his finding of fact numbered 20, as follows, to wit:

"That the only evidence as to the March 1, 1913, value of the National plant and its equipment is that contained in its Exhibit No. 13, which contains a report by Carl W. Siebeneichen, an accountant, of 'an examination of the real-estate account as carried on the books of the company representing the land and building value of the National plant,' and also 'an examination of the fixtures and machinery and vats and casts accounts of the National plant.' 462 (See minutes, p. 223.) This report was offered by the plaintiff upon the question of obsolescence of intangible assets (Min., p. 220) and was received in evidence solely upon this issue (Min., p. 226). The special master (referee) therefore finds that there is no evidence in this case to establish a depreciated March 1, 1913, value of the plaintiff's National plant and its equipment and therefore no evidence to support a recovery on account of alleged obsolescence of tangible assets."

LI. Said referee erred in not finding, as requested by defendant in his finding of fact numbered 21, as follows, to wit:

"The special master (referee) further finds that any good will which the plaintiff may have possessed was not rendered obsolete by prohibition legislation; that the same was useful to it in the conduct

of the cereal-beverage business after January 16, 1920, the effective date of the eighteenth amendment; that any good will which it retained after January 16, 1920, and which it possessed on December 23, 1920, the date of its liquidation, passed by virtue of its reorganization to the Haberle Beverage and Products Company, which new corporation continued its business with substantially the same stockholders and management at the same location and its headquarters being in the same building at 500 Butternut St., Syracuse;
463 that the Haberle Beverage & Products Company advertised and marketed some of its cereal beverage products under the names of 'Congo,' 'Congress,' and 'Derby,' names which were used by plaintiff in its business prior to October 29, 1919. (Min., p. 315.)"

And the said defendant also excepts to the conclusions of law contained in said decision, report, and finding of said referee, as follows, to wit:

LII. To the conclusions of law, contained in the paragraphs of said referee's conclusions of law numbered and designated 1, 2, 3, 4, 8, and 9, and to all other conclusions of law not in harmony and not consistent with the findings of fact and conclusions of law requested by said defendant.

Defendant also excepts to the refusal of said referee to find the conclusions of law found and contained in the paragraphs of the request of the defendant to find the same filed with said referee, to wit:

LIII. Defendant excepts to the refusal of said referee to find defendant's requested conclusions of law designated and numbered I, to wit:

"The revenue act of 1918 authorized no deductions from gross income on account of so-called obsolescences of good will";

LIV. Defendant also excepts to the refusal of said referee to find defendant's requested conclusion of law designated and numbered II, to wit:

464 "The plaintiff is not entitled to any deduction from gross income for the year ended May 31, 1919, on account of alleged obsolescences of good will."

LV. Defendant also excepts to the refusal of said referee to find defendant's requested conclusion of law, designated and numbered III, to wit:

"The plaintiff is not entitled to any independent deduction from its gross income for the fiscal year ended May 31, 1919, on account of the alleged obsolescence of its New York State liquor licenses or its powers of attorney or assignments controlling same."

LVI. Defendant also excepts to the refusal of said referee to find defendant's requested conclusion of law designated and numbered IV, to wit:

"The plaintiff is not entitled to any deduction from its gross income for the fiscal year ended May 31, 1919, on account of the alleged obsolescence of tangible assets including the National plant."

LVII. Defendant also excepts to the refusal of said referee to find defendant's requested conclusion of law designated and numbered V, to wit:

"Plaintiff is not entitled to any further deduction from its gross income for the fiscal year ended May 31, 1919, on account of de-
465 preciation of buildings situated on its so-called outside real estate."

LVIII. Defendant also excepts to the refusal of said referee to find defendant's requested conclusion of law designated and numbered VI, as follows, to wit:

"The defendant's motion to dismiss, made at the conclusion of all the testimony in this case, should be granted."

LVIX. Said defendant also excepts to the refusal of said referee to find defendant's requested conclusion of law designated and numbered VII, to wit:

"The defendant is entitled to judgment for costs."

LX. There are other manifest errors in the findings of fact made in this cause and action than those hereinbefore recited.

LXI. There are other manifest errors in the conclusions of law of said referee than those hereinbefore recited.

LXII. The said referee erred in not finding that the complaint of plaintiff did not state facts sufficient to constitute a cause of action.

LXIII. The said referee erred in not finding that said alleged plaintiff had no legal capacity to sue as a dissolved corporation at the time this suit was commenced.

LXIV. The said referee erred in not sustaining the motion of the said plaintiff to dismiss this cause made at the conclusion of the evidence offered in this said cause and action.

466 LXV. The said referee should have found for defendant upon the facts in this case as adduced at the hearing before him.

LXVI. The said defendant is entitled to judgment upon the facts and evidence adduced in this cause and action and the law governing the same.

OLIVER D. BURDEN,
United States District Attorney,
Northern District of New York,
Attorney for said defendant.

Office and post-office address, Federal Bldg., Syracuse, N. Y.

In United States District Court

[Title omitted.]

Defendant's request for findings of fact and conclusions of law

467 Comes now the defendant in the above-entitled case and requests the special master to make the following findings of fact:

1

The Haberle Crystal Brewing Company was organized May 23, 1892, under the laws of New York, with its principal place of business at Syracuse. From the date of its incorporation until October 29, 1919, it was engaged in the business of brewing and marketing lager beer and ale.

2

At all times material to the determination of this case plaintiff kept its accounts on the basis of a fiscal year ending on May 31st.

3

Plaintiff's claim for recovery in this action is now limited to an alleged overpayment of income and profits taxes for the fiscal year ending May 31, 1919 (Min., p. 128) in the maximum amount of $15,530.92 (Min., p. 327), and interest at 6% from March 20, 1921, to June 12, 1922 (Min., p. 357).

4

For the fiscal year ending May 31, 1919, plaintiff filed a corporation income and excess profits tax showing a net income subject to tax of $102,522.27, which sum was arrived at by the deduction from its gross income, among other things, of the sum of $123,525.63 (P. Ex. I), alleged depreciation on real estate (Sched. B,
468 complaint); that upon review and audit of said return by the Commissioner of Internal Revenue the sum of $24,755.15 was determined to be a reasonable allowance for depreciation (para. 18, complaint). The excessive depreciation claimed, to wit, the sum of $98,790.48, was added back to income, making a corrected net income of $201,312.75 (Claim for refund, P. Ex. I), upon which an additional tax of $17,283.30 was duly assessed. No deduction from gross income was taken or claimed in said return on account of obsolescence of good will or of tangible assets.

5

That said additional tax in the sum of $17,283.30, plus $1,209.83 interest was duly paid by the plaintiff under protest to the defendant herein on July 6, 1922. (P. Ex. 8.) (Min., p. 158.)

6

That on November 19, 1922, plaintiff duly filed a claim in which it claimed a refund of taxes paid for the fiscal year ending May 31, 1919, in the sum of $15,530.92; that said claim for refund was predicated solely upon its alleged right to deduct from its gross income for said year a reasonable allowance for obsolescence of good will. That said claim for refund was denied by the Commissioner of Internal Revenue on July 16, 1923.

7

For the purposes of its said claim for refund plaintiff
469 accepted as correct the commissioner's determination of a reasonable allowance for depreciation of real estate. (Claim for refund, P. Ex. 1.) Though this issue is raised in the pleadings no testimony was offered thereon by the plaintiff and the special master therefore finds that there is no evidence to support a recovery on account of the disallowance by the Commissioner of Internal Revenue of the sum of $98,870.48 of the $123,525.63 depreciation claimed on its buildings situated on its outside real estate.

8

That from the year 1904 to October, 1919, plaintiff owned and operated two plants—the "Haberle plant," located at 500 Butternut St., which was devoted to the brewing of lager beer, and the "National plant," located at 1000 Burnett Ave., Syracuse, which was devoted to the brewing of ale. (Min., p. 70.) During October, 1919, all brewing operations at the National plant ceased. The plaintiff thereafter confined its brewing activities to its Haberle plant, where it continued in the business of manufacturing and selling soft drinks and cereal beverages (Min., p. 77), until its liquidation on December 23, 1920. (P. Ex. 3.)

9

Pursuant to an accepted plan of liquidation a new corporation known as the Haberle Beverage and Products Company was organized as of January 1, 1921, which took over the Haberle plant

470 and all other property of the plaintiff except cash on hand, Liberty bonds, real estate mortgages, saloon and hotel properties, the National plant and equipment, accounts and inventories connected therewith. (Claim for refund, P. Ex. 1.) The Haberle Beverage and Products Company continued the business of manufacturing and selling soft drinks and cereal beverages theretofore conducted by the plaintiff at the Haberle plant and is still carrying on the same business at the same location at 500 Butternut St., Syracuse. (Min., p. 181.) With the exception of one individual the stockholders of the Haberle Beverage and Products Company are identical with the former stockholders of the plaintiff corporation. (Min., p. 308.)

10

The National plant was retained, to be disposed of in accordance with the judgment of the liquidating directors of the plaintiff company. (Plan of liquidation, P. Ex. 1.) A new corporation known as the Haberle Securities Company was thereafter organized, which on December 31 1921, took over the National plant for a consideration of approximately $100,000. (Minutes, p. 306.) With the exception of one individual the stockholders of the Haberle Securities Company are identical with the former stockholders of the plaintiff corporation and with the stockholders of the Haberle Beverage & Products Company.

471 11

On November 30, 1922, the Central City Cold Storage Company was organized, which company took over the National plant for a consideration of approximately $100,000. With the exception of one individual the stockholders of this new corporation are identical with the former stockholders of the plaintiff company and with the stockholders of the Haberle Beverage & Products Company. (Minutes, p. 308.) Since its incorporation said company has been and still is engaged in the operation of the former "National Brewery" as a cold-storage plant, with its place of business and headquarters in said plant at 1000 Burnett Ave., Syracuse. (Minutes, p. 310.)

12

The special master finds that the "National plant" was not rendered obsolete by prohibition legislation.

13

That at all times from its incorporation to January 1, 1918, the effective date of the President's war-time proclamation under the

emergency food survey act the plaintiff manufactured and sold lager beer and ale containing an alcoholic content of more than 4%. From January 1, 1918, until October 29, 1919, the alcoholic content of the plaintiff's products was restricted by law to 2.75%. (Minutes, p. 164.) Plaintiff's products were marketed principally in central New York State, in the territory from the Canadian boarder to the Pennsylvania line, and east as far as Albany and west to the city of Rochester.

472

14

From 1904 until October 29, 1919, plaintiff advertised and marketed its products under the names of "Congress Beer" and "Derby Cream Ale." (Minutes, pp. 105–106.) On August 7, 1913, these names were duly filed as trade-marks with the secretary of state of New York. (Ex. 19, Min., p. 256.)

15

In connection with its business the plaintiff owned various pieces of property more specifically referred to and described in Schedule B attached to complaint. (Min., p. 124.) These were licensed saloon properties controlled by the plaintiff and in which its products were conclusively sold.

16

Prior to March 1, 1913, plaintiff owned or controlled certain New York State liquor licenses (Min., p. 253) covering the right to engage in the sale of liquor in certain designated premises. These licenses were issued annually. (Min., pp. 244–245.) On March 1, 1913, plaintiff owned or controlled 130 liquor licenses. (Min., p. 238.) Any licenses owned or controlled by the plaintiff on October 29, 1919, were not the same licenses which it had owned or controlled on March 1, 1913.

473

17

The tangible net worth of the plaintiff as of the beginning of each of the five fiscal years prior to March 1, 1913, was as follows:

As at—	Net worth
June 1, 1907	$1,397,121.36
June 1, 1908	1,461,492.47
June 1, 1909	1,523,706.08
June 1, 1910	1,552,324.44
June 1, 1911	1,619,155.83

The net income for each of the five fiscal years ending prior to March 1, 1913, was as follows:

Net income	For fiscal year ending—
$112,871.11	May 31, 1908
110,803.81	May 31, 1909
122,998.19	May 31, 1910
130,831.39	May 31, 1911
100,064.37	May 31, 1912

The average tangible net worth of the plaintiff company as of the beginning of each of the five fiscal years prior to March 1, 1913, was $1,510,760.04. The average net income for each of the five fiscal years ending prior to March 1, 1913, was $115,533.77.

18

The special master finds that any liquor licenses owned or controlled by the plaintiff prior to, on, or after March 1, 1913, were used in its business for the sole purpose of assisting it in
474 marketing its products and of producing earnings (Min., p. 108), that such licenses or powers of attorney controlling the same constituted a part of the intangible assets of the plaintiff (Min., p. 97), that these licenses are in evidence in this case only upon the question of obsolescence of intangible assets (Min., p. 239), and that the value thereof, if any, to the plaintiff on March 1, 1913, is reflected in its earnings for the five prior years.

19

The special master finds that there is no evidence to support the finding that the good will of the plaintiff had any value on March 1, 1913.

20

That the only evidence as to the March 1, 1913, value of its National plant and its equipment is that contained in its Exhibit No. 13, which contains a report by Carl W. Siebeneichen, an accountant, of "an examination of the real estate account as carried on the books of the company representing the land and building value of the National plant" and also "an examination of the fixtures and machinery and vats and casts accounts of the National plant." (See minutes, p. 223.) This report was offered by the plaintiff upon the question of obsolescence of intangible assets (Min., p. 220) and was received in evidence solely upon this issue (Min., p. 226). The special master therefore finds that there is no evidence in this
475 case to establish a depreciated March 1, 1913, value of the

plaintiff's National plant and its equipment and therefore no evidence to support a recovery on account of alleged obsolescence of tangible assets.

21

The special master further finds that any good will which the plaintiff may have possessed was not rendered obsolete by prohibition legislation; that the same was useful to it in the conduct of the cereal-beverage business after January 16, 1920, the effective date of the eighteenth amendment; that any good will which it retained after January 16, 1920, and which it possessed on December 23, 1920, the date of its liquidation, passed by virtue of its reorganization to the Haberle Beverage & Products Company, which new corporation continued its business with substantially the same stockholders and management at the same location and with its headquarters in the same building at 500 Butternut St., Syracuse; that the Haberle Beverage & Products Company advertised and marketed some of its cereal beverage products under the names of "Congo," "Congress," and "Derby," names which were used by the plaintiff in its business prior to October 29, 1919. (Min., p. 315.)

From the foregoing findings of fact the special master is requested to make the following

476 CONCLUSIONS OF LAW

I

The revenue act of 1919 authorizes no deductions from gross income on account of so-called obsolescence of good will.

II

The plaintiff is not entitled to any deduction from gross income for the year ended May 31, 1919, on account of alleged obsolescence of good will.

III

The plaintiff is not entitled to any independent deduction from its gross income for the fiscal year ended May 31, 1919, on account of the alleged obsolescence of its New York State liquor licenses or its powers of attorney or assignments controlling same.

IV

The plaintiff is not entitled to any deduction from its gross income for the fiscal year ended May 31, 1919, on account of the alleged obsolescence of tangible assets including its National plant.

V

Plaintiff is not entitled to any further deduction from its gross income for the fiscal year ended May 31, 1919, on account of depreciation of buildings situated on its so-called outside real estate.

477 VI

The defendant's motion to dismiss, made at the conclusion of all the testimony in this case should be granted.

VII

The defendant is entitled to judgment for costs incurred herein.

In United States District Court

Exhibits

Plaintiff's Exhibit 2

The Haberle Crystal Spring Brewing Company

Certificate of incorporation

Certificate of incorporation. State of New York, county of Onondaga, city of Syracuse, ss: We, Frank B. Haberle, John H. Costello, William H. Haberle, Charles Haberle, and Edward Joy, all citizens and residents of the State of New York, do by these presents associate ourselves together to form a corporation pursuant to and in conformity with chapter 567 of the Laws of 1890 (the business corporation law, so-called) and the acts amendatory thereof and supplementary thereto, and for that purpose we do hereby certify as follows: 1. The name of the proposed corporation is "The Haberle Crystal Spring Brewing Company." 2. The object for which said corporation is formed is the manufacture and sale of lager beer, ale,
478 and porter; the making and selling of malt and the purposes of a general brewing business. 3. The amount of the capital stock of said corporation is $800,000. 4. The number of shares of

which its capital stock consists is eight thousand of the par value of one hundred dollars a share. 5. The location of its principal business office is to be Syracuse, N. Y. 6. The duration of said corporation shall be fifty years. 7. The number of its directors is eleven. 8. The names and post-office addresses of the directors, who are to manage the concerns of said corporation for the first year are as follows, viz, Frank B. Haberle, Syracuse, N. Y.; John H. Costello, Syracuse, N. Y.; William H. Haberle, Syracuse, N. Y.; Charles Schwarz, Syracuse, N. Y.; Charles Haberle, Syracuse, N. Y.; T. E. O'Keefe, Oswego, N. Y.; Thomas Ryan, Syracuse, N. Y.; John Dunfee, Syracuse, N. Y.; Anton Zahm, Syracuse, N. Y.; Edwin C. Hall, Syracuse, N. Y.; Anson E. Alvord, Syracuse, N. Y. 9. The names and post-office addresses of each subscriber to the stock of said corporation and a statement of the number of shares of stock which he agrees to take are as follows: Frank B. Haberle, Syracuse, N. Y., 5 shares; Charles Schwarz, Syracuse, N. Y., 5 shares; Charles Haberle, Syracuse, N. Y., 5 shares; T. E. O'Keefe, Oswego, N. Y., 5 shares; Thomas Ryan, Syracuse, N. Y., 5 shares; John Dunfee, Syracuse, N. Y., 5 shares; Anton Zahm, Syracuse, N. Y., 5 shares; Edwin C. Hall, Syracuse, N. Y., 5 shares; Anson E. Alvord, Syracuse, N. Y., 5 shares; Edward Joy, Syracuse, N. Y., 3,945 shares.

479 In witness whereof we have hereunto subscribed our names and seals and caused this certificate to be executed in duplicate this 21st day of May, 1892. Frank B. Haberle, L. S.; John H. Costello, L. S.; William H. Haberle, L. S.; Charles Haberle, L. S.; Thomas Ryan, L. S.; John Dunfee, L. S.; Anton Zahm, L. S.; Edwin C. Hall, L. S.; Edward Joy, L. S. State of New York, county of Onondaga, city of Syracuse, ss. On this 21st day of May, 1892, before me personally appeared Frank B. Haberle, John H. Costello, William H. Haberle, Charles Haberle, Thomas Ryan, John Dunfee, Anton Zahm, Edwin C. Hall, Edward Joy, to me known to be the persons in and who executed the above certificate and severally acknowledged the execution thereof. F. W. Barker, notary public. State of New York, county of Onondaga, city of Syracuse, ss. Frank B. Haberle, John H. Costello, William H. Haberle, Charles Haberle, Thomas Ryan, John Dunfee, Anton Zahm, Edwin C. Hall, Edward Joy, being severally duly sworn each for himself says that he is one of the directors named in the foregoing certificate, that four thousand shares of the capital stock of said corporation that being one-half of the capital stock thereof has been subscribed for and 45,500 being more than 10% of said capital stock subscribed for has been paid in cash to the directors named in said certificate. Edwin C. Hall, Anton Zahm, Thomas Ryan, John Dunfee, John H. Costello, William H. Haberle, Frank B. Haberle, Charles

480 Haberle. Sworn to before me this 21st day of May, 1892. F. W. Barker, notary public (duplicate). $1,000.00 Treasurer's Office, State of New York, Albany, May 23rd, 1892. Received from the Haberle Crystal Spring Brewing Company $1,000.00 in full of tax of one-eighth of one per centum upon the capital stock of 800,000 of the above-named company for the privilege of organization pursuant to chapter 143, Laws of 1886. Wm. G. Shaible, Acc't & Act'g. Dep. Comptroller. George B. Church, Deputy Treasurer (endorsed) Filed May 26, 1892, Recorded May 26, 1892, at 9 a. m.

DEFOREST SETTLE, *Clerk.*

Statement re plaintiff's Exhibit 4

This is a map of the plaintiff's Haberle plant on Butternut Street and the original will be produced on the argument if required.

Statement re plaintiff's Exhibit 5

This is a map of the plaintiff's National plant and the original will be produced on the argument if required.

481 *Plaintiff's Exhibit 6*

Whereas, the Haberle-Crystal Spring Brewing Company, a domestic corporation, with its principal offices located at Syracuse, N. Y., hereinafter designated as the party of the first part, has an interest in and power of attorney over the present and existing liquor tax certificate issued and that which is to be issued by the proper excise officer for Onondago County, which certificate permits the traffic in liquor at the premises known as No. 2002 N. Salina Street, in the city of Syracuse, county of Onondaga, N. Y., under subdivision one of section eight of the liquor tax law of the State of New York, otherwise known as chap. 34 of the Consolidated Laws, and being chap. 39 of the Laws of 1909 and all acts amending the same and supplemental thereto, and,

Whereas, the undersigned Miller & Dibbold of the city of Syracuse, county of Onondaga, N. Y., hereinafter designated as the party of the second part, is obligated to said first party, and said first party being interested in the liquor tax certificate hereinafter more fully described by number and series for said premises, and,

Whereas, said second party is desirous of procuring from said first party the use of said liquor tax certificate to enable said second party to carry on the traffic of liquor on said premises under the terms and conditions hereinafter stated, and

482 Whereas, said first party has consented, or is about to consent to have said liquor tax certificate issued to said second party for the purpose aforesaid, and said second party has made application to the excise issuing officer of said county therefor, which certificate is No. 17153 of the series of 1912 and 1913,

Now, therefore, know all men by these presents, that the undersigned, said second party, in consideration of one dollar to said second party in hand paid by said first party, and its agreement to sell its lager beer, ale, and porter, as hereinafter stated, and other obligations created and owing and which may hereafter be created and be owing from said second party to said first party, and for other good and valuable consideration, the receipt of all of which is hereby acknowledged, and in consideration of the transfer or issue of said liquor tax certificate in the name of said second party, I, said second party, do hereby promise, covenant and agree to and with said first party, as follows:

1. Said second party, shall, during the time he is permitted the use, possession, and privilege of said liquor tax certificate and any and all of its renewals or re-renewals, if any, pay to said first party all his obligations and debts owing said first party when due, and in case said first party shall accept the note or notes of said second party for such obligations or debts, such note or notes shall not be in payment thereof until actually paid.

483 2. Said second party shall, for a period of five (5) years from this date and during all the time that said first party permits said second party the possession, privilege, or use of said certificate and any and all of its renewals or re-renewals, sell, use and serve and cause to be sold, used, and served on said premises, exclusively, the lager beer, ale, and porter manufactured and sold by said first party, and in any other place or premises to which said certificate or any of its renewals may be transferred or reissued for during said period of five (5) years, and pay said first party therefor its market value at the city of Syracuse, N. Y., at the time of each delivery, which deliveries thereof shall be made by said first party at Syracuse, N. Y., in the usual and ordinary way and in the usual and ordinary course and conduct of its business.

3. Said second party shall not assign, cancel, transfer, or surrender said liquor tax certificate, renewal, or re-renewal thereof or any rights therein or thereunder, either present or future, to any person, persons, or corporation, than the party of the first part or its assigns, and shall not apply for a transfer of such certificate to any other premises than those above mentioned, and said second party, his agents and servants, shall deliver up to said first party, its suc-

cessors, representatives, and assigns, upon demand, said liquor tax certificate and each of them with all unexpired coupons thereon, and said second party does hereby authorize and empower said first party, its agents, attorneys, and representatives, at any time, either for
484 or without cause, to enter the said premises or any other premises or place where said liquor tax certificate or renewal may be, forcibly or otherwise, and take away said certificate or certificates from said premises or place and without being liable for any damages for trespass or injury to person or property or otherwise by reason thereof, and said first party may replevy and recover the possession of each, either or all of said liquor tax certificates, and said second party, for value received, waives any defense that he might otherwise have thereto, on the ground that said certificates are not chattels or personal property, which stipulation, at all times, shall be binding on said second party, his heirs, executors, administrators, and assigns, and said second party shall not use or permit said licensed premises or any part thereof to be used for any gambling purposes or cause or permit the said premises to become disorderly or in any other manner cause or permit said premises to be used or occupied so as to prevent the continued lawful issue and lawful use of such certificate therein, or perform any act or omission so as to impair or prejudice said first party's ownership, possession of, and interest in said certificate and all its renewals.

For the consideration aforesaid, said second party does hereby and herein sell, assign, transfer, set over, and deliver unto said first party, its successors and assigns, all the right, title, power, privilege, option, and interest which said second
485 party now has or which he may hereafter have or acquire in and to said liquor tax certificate, any and all of its renewals and re-renewals, including all rights and privileges which said second party may, in any wise, acquire thereto or therein by reason of said excise law and statute and any law or statute amending the same or supplemental thereto, with the right, power, and privilege to said first party and its assigns, of applying for and procuring a new or renewal certificate or certificates for said premises or for the premises to which the same may be transferred, and of transferring, cancelling, and surrendering each and all of said certificates and at any time transferring the same and each of them to other premises and to abandon said licensed premises and any other premises to which the same or any of said certificates may be transferred, and to surrender and cancel the same and collect the rebate therefor and the unused coupons thereof, and I do hereby make, constitute, and appoint Edwin C. Hall, the treasurer of said first party, and his successor in office, in the event of his death or resignation as such,

and his substitute my true and lawful attorney irrevocable, for me and in my name, place, and stead, to, at any time, surrender, sell, assign, transfer, set over, and deliver unto said first party or to any other person, persons, or corporation, said liquor tax certificate and each and all its renewals, and re-renewals, to, at any time,
486 apply for a new certificate for said certificated premises or for the premises to which said certificates or any of them may be transferred, and cause the same to be issued to me or to any other person or persons, and to have said certificate and each of them transferred to any premises other than those above mentioned and to, at any time, abandon the said premises or any premises to which said liquor tax certificate or any of them may be transferred, and to make, sign, execute, acknowledge, and deliver for me and in my name, place, and stead, at any time, any certificate of abandonment or other petition, paper, or document necessary for that purpose and to surrender and cancel said liquor tax certificate and each of them and to make, sign, execute, acknowledge, and deliver for me and in my name, place, and stead, any and all bills of sale, assignments, surrenders, transfers, and all applications in writing for or otherwise proper or necessary for procuring the same and for the sale, assignment, transfer, surrender, or cancellation of such certificate and certificates, and to execute and deliver for me and in my name, place, and stead, all other papers and documents necessary in the premises and without him or said company being liable to me for any damages therefor or by reason thereof, in any event, and I hereby ratify and confirm all that my said attorney or his substitute, successor, or assign may do in the premises, and I do hereby forever waive and release any and all claims to said liquor tax certificate and all of its renewals and re-renewals.

487 Said second party shall, at the option of said first party, make application prior to thirty days before the expiration of said liquor tax certificate, according to law, for a new or renewal certificate for said premises yearly during the continuance of this agreement, or for such other premises as the same may have been transferred to upon said first party paying or tendering to the proper official of the excise department the tax and fees required by law therefor, and upon the issuing of such new certificate yearly aforesaid, second party shall immediately and concurrent therewith make, execute, and deliver to said first party or its assigns an assignment and transfer thereof, as well as a power of attorney in manner and form and in accordance with this assignment, agreement, and power of attorney by executing and delivering duplicates of this assignment, agreement, and power of attorney to said first party, but changing the number and dates and place, if necessary, should the same be transferred to another place so as to make such new

assignment, agreement, and power of attorney complete and in keeping with this said assignment, agreement, and power of attorney; and upon failure of said second party to so apply and to so execute and deliver said assignment, agreement, and power of attorney as aforesaid, then, and in that or either event, said second party's said attorney, the said Edwin C. Hall, his substitute, or successor
488 may make for said second party and in his name, place, and stead such petition and application for the issuing of such certificate; and, when issued, make, execute, and deliver in the name, place, and stead of said second party said duplicates of this assignment, agreement, and power of attorney aforesaid; and upon said second party's failure to so apply for such new certificate and make, execute, and deliver said duplicates aforesaid within the time aforesaid said first party or said second party's said attorney, successor, or substitute may, at its option, in the name of said second party or otherwise, cause such new or renewal certificate to be issued to and in the name of any other person or persons for said premises or the premises to which the same may have been transferred; and said second party does hereby empower his said attorney to make, execute, and deliver all papers and documents necessary in the premises to so do.

It is herein expressly agreed and understood that the power of attorney herein given to said Edwin C. Hall, the treasurer of said first party, his successor in office, and his lawful substitute, and all rights and powers herein vested in him and them and in said first party shall, at the option of said first party, continue in full force and effect for the term of five (5) years from the date hereof; and the same or any of the rights, privileges, and powers herein given and conferred upon them and each of them can not be withdrawn,
489 annulled, cancelled, or lessened by said second party, his heirs, executors, administrators, or assigns during that time; and the said Edwin C. Hall is herein appointed the attorney of said second party, with power to him of substitution for said term of five (5) years, with all the powers aforesaid; and it is herein further agreed and understood that in case of the death or resignation of said Edwin C. Hall as such treasurer of said first party that his successor in office and his lawful substitute shall have and be vested with all the powers, rights, and privileges placed in him by said second party.

It is further agreed and understood that in case said first party consents to, suffers, or permits the doing by said second party of any act or omission which might alter, change, or modify any of the provisions of this agreement and instrument, such consent, whether express or implied, shall not be deemed to be and shall not be a

waiver of such or of any of the conditions of this agreement or any renewals thereof, except for that instance alone, and shall not be construed to, and shall not authorize said second party to make any other or further violation thereof.

It is further expressly agreed and understood between the parties hereto, that without cause or if for any cause or reason, said first party may, at any time, deem itself or its rights or interest in said certificate or renewals unsafe, or if it shall, at any time, deem it undesirable to further permit said second party the use or
490 possession of such certificate or renewals, it may take immediate possession of the same and each of them wherever they may be and exercise any of its rights and privileges and assign, transfer, surrender, or cancel the same or otherwise, as is provided in this agreement, as well as any and all renewal certificates thereof, and upon said first party so deeming itself or its interest unsafe or desiring to terminate said second party's use of said certificate or renewal certificate and upon exercising any of the powers and privileges herein conferred upon said first party and the said attorney of said second party by said first party or either of them, to terminate said second party's use or possession of such certificate or renewal certificate aforesaid, said second party shall have no further right, title, or interest in or to said liquor tax certificate or any of its renewals in any manner, and shall have no right to further traffic in liquor thereunder or by reason thereof at said premises or elsewhere, and said second party herein expressly agrees to give said first party immediate possession of the said licensed premises whenever it desires for the purpose to abandon the same or transfer, assign, surrender, or cancel said liquor tax certificate, or any renewal liquor tax certificate aforesaid, or procure a new certificate therefor, as provided herein and without any previous notice to said second party to vacate the same.

It is further expressly understood and agreed that the fact that such certificate or renewals may be issued to and in the name
491 of said second party upon his application therefor, shall not affect or lessen said first party's ownership and interest therein or thereto, and that it is the privilege of the use only which said second party has or can acquire thereto, and such use to continue only at the will and pleasure of said first party, and all liquor tax certificates or renewals aforesaid, as well as all rights thereto and thereunder, and the party to whom the same may be issued or transferred shall be bound by this agreement and power of attorney and all its terms until this agreement is cancelled by said first party in writing.

Notice is hereby given to the excise certificate issuing officer for Onondaga County and his successor in office, to file this assignment,

agreement, and power of attorney in his office and properly index the same to said liquor tax certificate, renewals and the licensed premises, and he is hereby notified and directed not to transfer, cancel, or otherwise dispose of said liquor tax certificate or any renewal thereof to any other premises or to any other person or persons whomsoever, nor consent thereto, nor refund any money upon the surrender thereof, nor file any notice of abandonment, as provided by law of the certificated premises, except upon the application of said first party, its assigns or its said attorney duly made in writing therefor.

Should said liquor tax certificate or any of its renewals, for any reason, be revoked or forfeited, as provided by law, said
492 first party or its assigns shall have the sole right to arrange for, designate, petition for, and delegate to whom a new certificate may be issued, and such new certificate and the person to whom the same shall be issued shall be subject to and bound by the terms of this agreement.

Should this agreement, power of attorney, and instrument be executed and delivered by me before the actual issuing of said liquor tax certificate for said premises, then and in that event I hereby consent that said first party or its attorney or agent may fill in and insert herein in this instrument, the number of said certificate in the blank place left therefor, and that this instrument and all its covenants and conditions shall be as binding on me and on said certificate and premises, if executed by me before the actual issuing of said liquor tax certificate as if the same was executed and delivered by me after the actual issuing and delivery of said liquor tax certificate, and it is herein further agreed and understood that where the singular masculine "he" or "him" is used in this instrument, it applies to the plural, feminine or neuter, as the case may be, and in keeping with the parties executing the same.

This assignment, agreement, and power of attorney and all its conditions shall be binding on said second party, his heirs, executors, administrators, and assigns.

In witness whereof, I have signed, sealed, and executed this instrument this 4th day of April, 1913.

MILLER & DIBBOLD. [L. S.]

493 STATE OF NEW YORK,
County of Onondaga, city of Syracuse, ss:

On this 4th day of April, 1913, before me, the subscriber, personally came Miller & Dibbold, to me personally known to be the same person mentioned and described in and who executed the foregoing instrument, and they duly acknowledged to me that they executed the same.

EDWARD OSWALD,
Notary Public.

Plaintiff's Exhibit 10

Amen, Surdam & Company, accountants and auditors, Liberty Building, Buffalo, N. Y.

ROCHESTER OFFICE, *April 18, 1924.*

Mr. WALTER WELCH,
Attorney at Law, 706 City Bank Building,
Syracuse, N. Y.

DEAR SIR: Pursuant to your request, we have examined the books of the Haberle Crystal Spring Brewing Company, Syracuse, N. Y., covering the fiscal accounting periods of the company beginning June 1, 1907, and ending May 31, 1919, both dates inclusive, and have analyzed and summarized the profit and loss accounts
494 for the years covered and prepared balance sheets and statements of income and profit and loss, the former showing the financial condition of the company at the close of each accounting period, and the latter the result of its operations in each fiscal year.

The result of our examination is illustrated in the exhibits attached hereto, these being:

Balance sheets for each year beginning with June 1, 1907, and ending May 31, 1919, both dates inclusive.

Statements of income and profit and loss for each year beginning with the year ending May 31, 1908, and concluding with the year ending May 31, 1919.

We hereby certify that the balance sheets and statements of income and profit and loss submitted herewith show, respectively, the financial condition of the company and the result of its operations for the periods ending on the respective dates indicated as reflected by its books of account.

Respectfully,

AMEN, SURDAM & COMPANY.

CWS/BB

EXHIBIT "A"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1907

ASSETS

Cash on hand and in bank		$12,696.11
Accounts receivable	$125,453.91	
Loans receivable	58,998.12	
Bills receivable	239,953.84	
		424,405.87

495	Inventories:		
	Materials and supplies	$20,953.36	
	Internal revenue	1,247.88	
	Lager on hand	$30,550.00	
	Ale on hand	11,550.00	
		41,994.49	
			$64,196.73
	Kearney Brewery		75,695.00
	Deferred charges		3,267.60
	Fixed assets:		
	Real estate (plant)	$621,688.36	
	Real estate (properties)	63,176.58	
	Fixtures and machinery	234,235.25	
	Saloon fixtures	18,403.48	
	Vats and casks	34,528.04	
	Bottling department	18,855.50	
	Horses	9,650.00	
	Wagons, sleighs, and harness	6,718.66	
	Packages	83,383.87	
	Signs	169.12	
			1,090,808.86
	Total assets		$1,671,059.34

LIABILITIES

	Accounts payable		$21,528.34
	Bills payable		192,175.00
	Reserve for bad debts		31,607.18
	Discounts and allowances accrued		28,536.46
	Capital and surplus:		
	Capital stock	$800,000.00	
	Surplus	$474,344.96	
	Undivided profits	122,776.40	
		597,121.36	
			1,397,121.36
	Total liabilities		$1,671,059.34

496 EXHIBIT "B"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profit and loss for the fiscal year ending May 31, 1908

	Sales:		
	Lager and ale		$888,259.78
	Less: Discount and allowances		128,074.29
	Net sales		$760,185.49
	Cost of sales:		
	Lager and ale on hand June 1, 1907	$41,944.49	
	Materials and supplies	214,734.79	
		$256,729.28	
	Less: Lager and ale on hand May 31, 1908	54,627.50	
		$202,101.78	

Plus:		
Productive labor	45,727.29	
Manufacturing supplies	24,710.90	
Internal revenue	129,828.75	
Total		$402,368.81
Profit from sales		357,816.68
497 General expense:		
Depreciation	$64,394.38	
Repairs	19,460.38	
Administrative, selling, and general expense	166,175.62	
Total		250,030.38
Profit from operations		$107,786.30
Miscellaneous additions to income:		
Grain sales	$9,313.80	
Ice sales	2,190.27	
Rents	3.05	
Interest and exchange	6,509.42	
Recovery of bad debts	9,661.61	
Total		27,678.15
		$135,464.45
Miscellaneous expense:		
Interest paid	$2,863.48	
Reserve for bad debts	20,229.86	
Total		23,093.34
Net profit for year		$112,371.11
May 31, 1907: Surplus and undivided profits (Exhibit A)		597,121.36
Gross		$709,492.47
Dividends paid		48,000.00
May 31, 1908: Surplus and undivided profits (Exhibit C)		$661,492.47

498

EXHIBIT "C"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1908

ASSETS

Cash on hand and in bank		$4,269.61
Accounts receivable	$120,599.23	
Loans receivable	67,562.44	
Bills receivable	184,370.41	
		372,532.08
Inventories:		
Materials and supplies	$33,189.26	
Internal revenue	909.13	
Lager on hand	$42,765.00	
Ale on hand	11,802.50	
	54,627.50	
		88,785.89

Kearney Brewery		$50,000.00
Deferred charges		2,938.29
Fixed assets:		
Real estate (plant)	$630,732.46	
Real estate (properties)	65,434.27	
Fixtures and machinery	240,061.88	
Saloon fixtures	22,167.48	
Vats and casks	31,268.74	
Bottling department	19,023.00	
Horses	10,525.00	
Wagons, sleighs, and harness	5,664.00	
Packages	86,347.53	
Signs	532.20	
		1,111,756.56
Total assets		$1,630,282.43

499 LIABILITIES

Accounts payable		$18,740.63
Bills payable		95,175.00
Reserve for bad debts		35,655.90
Discounts and allowances accrued		19,218.34
Capital and surplus:		
Capital stock	$800,000.00	
Surplus	$549,121.36	
Undivided profits	112,371.11	
	661,492.47	
		1,461,492.47
Total liabilities		$1,630,282.43

EXHIBIT "D"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profit and loss for the fiscal year ending May 31, 1909

Sales:		
Lager and ale		$916,718.25
Less: Discount and allowances		132,784.88
Net sales		$783,933.37
500 Cost of sales:		
Lager and ale on hand June 1, 1908	$54,627.50	
Materials and supplies	209,505.73	
	$264,133.23	
Less: Lager and ale on hand May 31, 1909	47,311.88	
	$216,821.35	
Plus: Productive labor	48,532.31	
Manufacturing supplies	25,261.78	
Internal revenue	134,705.50	
Total		425,320.94
Profit from sales		$358,612.43

General expense:		
Depreciation	$89,126.30	
Repairs	31,752.96	
Administrative, selling, and general expense	161,230.20	
Total		$282,109.46
Profit from operations		$96,502.97
Miscellaneous additions to income:		
Grain sales	$9,756.65	
Ice sales	3,373.64	
Interest and exchange	4,658.00	
Recovery of bad debts	7,961.29	
Total		25,749.58
		$122,252.55
501 Miscellaneous expense:		
Interest paid	$705.22	
Reserve for bad debts	10,743.52	
Total		11,448.74
Net profit for year		$110,803.81
May 31, 1908: Surplus and undivided profits (Exhibit C)		661,492.47
Gross		$772,296.28
Dividends paid	48,000.00	
Loss on sale of properties	590.20	
		48,590.20
May 31, 1909: Surplus and undivided profits (Exhibit E)		$723,706.08

EXHIBIT "E"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1909

ASSETS

Cash on hand and in bank		$11,396.54
Accounts receivable	$116,259.00	
Loans receivable	42,055.47	
Bills receivable	244,786.57	
		403,101.04
Inventories:		
Materials and supplies	$31,697.21	
Internal revenue	988.63	
Lager on hand	$35,100.00	
Ale on hand	12,211.88	
	47,311.88	
		79,997.72
Deferred charges		4,567.65

502	**Fixed assets:**		
	Real estate (plant)	$635,448.74	
	Real estate (properties)	72,736.83	
	Fixtures and machinery	239,180.49	
	Saloon fixtures	27,944.26	
	Vats and casks	27,700.88	
	Bottling department	19,388.00	
	Horses	8,870.00	
	Wagons, sleighs, and harness	5,347.50	
	Packages	85,333.48	
	Signs	573.05	
			$1,122,523.22
	Total assets		$1,621,588.18

LIABILITIES

Accounts payable			$18,494.97
Bills payable			22,300.00
Reserve for bad debts			34,935.08
Discounts and allowances accrued			22,151.45
Capital and surplus:			
Capital stock		$800,000.00	
Surplus	$612,902.27		
Undivided profits	110,803.81		
		723,706.08	
			1,523,706.08
Total liabilities			1,621,588.18

503 EXHIBIT "F"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profit and loss for the fiscal year ending May 31, 1910

Sales:		
Lager and ale		$980,964.45
Less: Discount and allowances		153,170.13
Net sales		$827,794.32
Cost of sales:		
Lager and ale on hand June 1, 1909	$47,311.88	
Material and supplies	198,898.24	
	$246,210.12	
Less: Lager and ale on hand May 31, 1910	39,088.37	
	$207,121.75	
Plus: Productive labor	$47,801.58	
Manufacturing supplies	25,728.04	
Internal revenue	145,710.00	
Total		426,361.37
Profit from sales		401,432.95

General expense:		
Depreciation	$98,838.11	
Repairs	7,060.24	
Administrative, selling, and general expense	167,260.39	
Total		$273,158.74
Profit from operations		$128,274.21
504 Miscellaneous additions to income:		
Grain sales	$10,433.28	
Ice sales	5,646.70	
Interest and exchange	9,710.22	
Recovery of bad debts	4,708.11	
Total		30,498.31
		$158,772.52
Miscellaneous expense:		
Reserve for bad debts	$35,653.33	
Miscellaneous expense	121.00	
Total		35,774.33
Net profit for year		$122,998.19
May 31, 1909: Surplus and undivided profits (Exhibit E)		723,706.08
Gross		$846,704.27
Dividends	$64,000.00	
Loss on sale of properties	5,962.00	
Payment to E. C. Hall	15,042.18	
Payment to Wm. H. Haberle	9,375.65	
		94,379.83
May 31, 1910: Surplus and undivided profits (Exhibit G)		$752,324.44

505

EXHIBIT "G"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1910

ASSETS

Cash on hand and in bank		$89,527.05
Accounts receivable	$115,930.07	
Loans receivable	3,030.87	
Bills receivable	225,733.58	
		344,695.52
Inventories:		
Material and supplies	$17,459.19	
Internal revenue	1,328.63	
Lager on hand $27,460.00		
Ale on hand 11,628.37		
	39,088.37	
		57,876.19
Deferred charges		4,001.16

Fixed assets:		
Real estate (plant)	$635,850.89	
Real estate (properties)	71,606.81	
Fixtures and machinery	236,126.71	
Saloon fixtures	26,760.26	
Vats and casks	25,339.63	
Bottling department	5,000.00	
New bottling plant	40,494.36	
Horses	9,200.00	
Wagons, sleighs, and harness	4,144.75	
Packages	88,061.23	
Signs	249.85	
		$1,142,934.6
Total assets		$1,638,904.6

506 LIABILITIES

Accounts payable		$17,019.07
Bills payable		9,800.00
Reserve for bad debts		37,047.72
Discounts and allowances accrued		22,742.12
Capital and surplus:		
Capital stock	$800,000.00	
Surplus	$629,326.25	
Undivided profits	122,998.19	
	752,324.44	
		1,552,324.44
Total liabilities		$1,638,933.43

EXHIBIT "H"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profit and loss for the fiscal year ending May 31, 1911

Sales:		
Lager and ale		$1,061,837.3
Less: Discount and allowances		173,326.73
Net sales		$888,510.73
507 Cost of sales:		
Lager and ale on hand June 1, 1910	$39,088.37	
Materials and supplies	243,833.06	
	$282,921.43	
Less: Lager and ale on hand May 31, 1911	40,243.00	
	$242,678.43	
Plus:		
Productive labor	50,561.63	
Manufacturing supplies	26,033.04	
Internal revenue	156,676.76	
Total		475,949.86
Profit from sales		412,560.87

General expense:		
Depreciation	$121,546.87	
Repairs	19,675.23	
Administrative, selling, and general expense	162,433.18	
Total		$303,655.28
Profits from operations		108,905.64
Miscellaneous additions to income:		
Grain sales	$11,599.66	
Ice sales	3,844.94	
Interest and exchange	10,529.31	
Recovery of bad debts	4,295.03	
		30,268.94
Total		$139,174.58
508 Miscellaneous expense:		
Reserve for bad debts	$7,995.44	
Miscellaneous expense	347.75	
Total		8,343.19
Net profit for year		$130,831.39
May 31, 1910: Surplus and undivided profits (Exhibit G)		752,324.44
Gross		$883,155.83
Dividends paid		64,000.00
May 31, 1911: Surplus and undivided profits (Exhibit I)		$819,155.83

EXHIBIT "I"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1911

ASSETS

Cash on hand and in bank		$34,430.37
Accounts receivable	$134,548.77	
Loans receivable	410.21	
Bills receivable	234,801.02	
		369,760.00
509 Inventories:		
Materials & supplies	30,774.57	
Internal revenue	1,451.87	
Lager on hand $28,544.00		
Ale on hand 11,699.00		
	40,243.00	
		72,469.44
Deferred charges		4,551.50
Fixed assets:		
Real estate (plant)	684,664.82	
Real estate (properties)	102,870.41	
Fixtures & machinery	250,981.51	
Vats & casks	55,025.81	
Bottling department	4,569.27	

Fixed assets—Continued.		
New bottling plant	$71,045.59	
Horses	10,000.00	
Wagons, sleighs, & harness	5,427.55	
Packages	88,143.86	
Signs	436.10	
		$1,273,164.92
Total assets		$1,754,376.22

LIABILITIES

Accounts payable		$29,068.34
Bills payable		38,500.00
Reserve for bad debts		41,510.30
Discounts and allowances Accrued		25,551.78
Capital and surplus:		
Capital stock	$800,000.00	
Surplus	$688,324.44	
Undivided profits	130,831.39	
	819,155.83	
		1,619,155.83
Total liabilities		1,754,376.22

510 EXHIBIT "J"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profit and loss for the fiscal year ending May 31, 1912

Sales:		
Lager & ale		$1,165,206.10
Less: Discounts and allowances		195,524.86
Net sales		969,681.24
Cost of sales:		
Lager & ale on hand June 1, 1911	$40,243.00	
Materials and supplies	369,184.15	
	$409,427.15	
Less: Lager & ale on hand May 31, 1912	74,384.69	
	$335,042.46	
Plus: Productive labor	55,572.40	
Manufacturing supplies	29,978.80	
Internal revenue	170,884.75	
Total		$591,478.41
Profit from sales		$378,202.83
511 General expense:		
Depreciation	$69,813.88	
Repairs	22,821.60	
Administrative, selling, and general expense	209,051.10	
Total		$301,686.58
Profit from operations		$76,516.25

Miscellaneous additions to income:		
Grain sales	$12,726.90	
Ice sales	3,451.41	
Interest and exchange	2,607.52	
Recovery of bad debts	5,062.31	
Reserve for bad debts, credit	39,965.35	
Total		$63,813.49
		$140,329.74
Miscellaneous expense: Reserve for bad debts		39,665.37
Net profit for year		$100,664.37
May 31, 1911: Surplus and undivided profits (Exhibit I)		819,155.83
Gross		$919,820.20
Dividends paid	$64,000.00	
Suspense adjustments	2,212.15	
		66,212.15
May 31, 1912: Surplus and undivided profits (Exhibit K)		$853,608.05

512

EXHIBIT "K"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1912

ASSETS

Cash on hand and in bank			$17,111.22
Accounts receivable		$128,494.00	
Loans receivable		1,481.40	
Bills receivable		248,208.87	
			378,184.27
Inventories:			
Materials and supplies		$56,423.71	
Internal revenue		1,242.12	
Lager on hand	$56,972.50		
Ale on hand	17,412.19		
		74,384.69	
			132,050.52
Deferred charges			4,636.92
Fixed assets:			
Real estate (plant)		$723,785.05	
Real estate (properties)		117,735.36	
Fixtures and machinery		262,717.93	
Vats and casks		52,558.22	
Bottling department		4,569.27	
Bottling plant		71,184.80	
Horses		7,370.00	
Wagons, sleighs & harness		4,674.25	
Automobiles		14,461.15	
Packages		89,710.85	
			1,348,766.88
Total assets			$1,880,749.81

513 LIABILITIES

Accounts payable			$22,532.51
Bills payable			139,000.00
Reserve for bad debts			39,665.37
Discounts and allowances accrued			25,943.88
Capital and surplus:			
Capital stock		$800,000.00	
Surplus	$752,943.68		
Undivided profits	100,664.37		
		853,608.05	
			1,653,608.05
Total liabilities			$1,880,749.81

EXHIBIT "L"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profit and loss for the fiscal year ending May 31, 1913

Sales:			
Lager and ale			$1,228,374.32
Less: Discount and allowances			176,291.27
Net sales			$1,052,083.05
514 Cost of sales:			
Lager and ale on hand June 1, 1912		$74,384.69	
Material and supplies		314,296.10	
		$388,680.79	
Less: Lager and ale on hand May 31, 1913		62,504.87	
		$326,175.92	
Plus:			
Productive labor		54,128.20	
Manufacturing supplies		29,945.90	
Internal revenue		178,795.87	
Total			589,045.89
Profit from sales			$463,037.16
General expense:			
Depreciation		$85,973.98	
Repairs		27,074.96	
Administrative, selling, and general expense		212,952.58	
Total			326,001.52
Profit from operations			137,035.64
515 Miscellaneous additions to income:			
Grain sales		$12,392.38	
Ice sales		2,884.45	
Interest and exchange		3,497.68	
Recovery of bad debts		4,249.19	
Reserve for bad debts credited		22,736.29	
Total			45,689.99
			$182,725.63

Miscellaneous expense:		
Reserve for bad debts	$36,983.18	
Interest and exchange	119.43	
Total		$37,102.61
Net profit for year		145,623.02
May 31, 1912: Surplus and undivided profits (Exhibit K)		853,608.05
Gross		$999,231.07
Dividends paid		64,000.00
May 31, 1913: Surplus and undivided profits (Exhibit M)		$935,231.07

516

EXHIBIT "M"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1913

ASSETS

Cash on hand and in bank		$12,002.53
Accounts receivable	$126,416.45	
Loans receivable	1,031.77	
Bills receivable	247,274.17	
		374,722.39
Inventories:		
Materials and supplies	$37,871.77	
Internal revenue	1,326.25	
Lager on hand $47,032.00		
Ale on hand 15,472.87		
	62,504.87	
		101,702.89
Deferred charges		4,378.28
Fixed assets:		
Real estate (plant)	$728,644.02	
Real estate (properties)	153,258.14	
Fixtures and machinery	262,125.58	
Vats and casks	48,254.34	
Bottling plant	48,249.36	
Bottling-plant equipment	29,164.69	
Horses	6,925.00	
Wagons, sleighs, and harness	4,311.00	
Automobiles	21,368.42	
Packages	80,739.77	
		1,383,040.32
Total assets		$1,875,846.41

517

LIABILITIES

Accounts payable		$16,153.18
Bills payable		57,000.00
Reserve for bad debts		36,983.18
Discounts and allowances accrued		30,478.98
Capital and surplus:		
Capital stock	$800,000.00	
Surplus $789,608.05		
Undivided profits 145,623.02		
	935,231.07	
		1,735,231.07
Total liabilities		$1,875,846.41

EXHIBIT "N"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profit and loss for the fiscal year ending May 31, 1914

Sales:			
Lager and ale			$1,381,912.90
Less: Discount and allowances			219,790.70
Net sales			$1,162,122.20
518 Cost of sales:			
Lager and ale on hand June 1, 1913		$62,504.87	
Materials and supplies		287,344.35	
		$349,849.22	
Less: Lager and ale on hand May 31, 1914		63,296.25	
		$286,552.97	
Plus: Productive labor		58,281.65	
Manufacturing supplies		31,578.47	
Internal revenue		196,772.63	
Total			573,185.72
Profit from sales			$588,936.57
General expense:			
Depreciation		$110,118.83	
Repairs		29,840.39	
Administrative, selling, and general expense		234,182.98	
Total			374,142.20
Profit from operations			$214,814.37
Miscellaneous additions to income:			
Grain sales		$13,732.92	
Ice sales		3,544.68	
Interest and exchange		4,980.95	
Bad debts recovered		518.46	
Reserve for bad debts credit		32,929.05	
Total			55,706.06
			$270,520.43
519 Miscellaneous expense: Reserve for bad debts			34,828.40
Net profit for year			$234,692.03
May 31, 1913: Surplus and undivided profits (Exhibit M)			935,231.07
Gross			$1,170,923.10
Dividends paid			64,000.00
May 31, 1914: Surplus and undivided profits (Exhibit O)			$1,106,923.10

EXHIBIT "O"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1914

ASSETS

Cash on hand and in bank			$16,096.34
Accounts receivable		$161,259.49	
Loans receivable		4,898.82	
Bills receivable		298,087.63	
			464,245.94
Inventories:			
Materials and supplies		$40,348.27	
Internal revenue		2,233.62	
Lager on hand	$48,958.00		
Ale on hand	14,338.25		
		63,296.25	105,878.14
Deferred charges			8,171.38
520 Fixed assets:			
Real estate (plant)		$745,873.09	
Real estate (properties)		346,820.52	
Fixtures and machinery		274,036.86	
Vats and casks		64,317.07	
Bottling plant		48,519.36	
Bottling plant equipment		35,214.69	
Horses		5,850.00	
Wagons, sleighs, and harness		3,903.00	
Automobiles		19,065.22	
Packages		75,695.58	
			1,599,295.39
Total assets			$2,193,687.19

LIABILITIES

Accounts payable			$21,538.30
Bills payable			200,000.00
Reserve for bad debts			28,034.44
Discounts and allowances accrued			37,191.35
Capital and surplus:			
Capital stock		$800,000.00	
Surplus	$871,231.07		
Undivided profits	235,692.03		
		1,106,923.10	
			1,906,923.10
Total liabilities			$2,193,687.19

521

EXHIBIT "P"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profit and loss for the fiscal year ending May 31, 1915

Sales:		
Lager and ale		$1,422,011.46
Less: Discount and allowances		259,242.42
Net sales		$1,162,769.04

Cost of sales:		
Lager and ale on hand June 1, 1914	$63,296.25	
Materials and supplies	326,166.56	
	$389,462.81	
Less: Lager and ale on hand May 31, 1915	66,115.75	
Plus:		
Productive labor	61,998.52	
Manufacturing supplies	32,967.07	
Internal revenue	246,856.53	
Total		$665,169.18
Profit from sales		$497,599.86
General expense:		
Loss on bottling department operations	$4,974.48	
Depreciation	80,918.90	
Repairs	32,131.57	
Administration, selling, and general expense	248,204.79	
Total		366,229.83
Profit from operations		$131,370.03
522 Miscellaneous additions to income:		
Grain sales	$14,087.83	
Ice sales	3,307.81	
Interest and exchange	2,132.66	
Bad debts recovered	11,311.86	
Reserve for bad debts credit	27,028.45	
Total		57,868.61
		$189,238.64
Miscellaneous expense: Reserve for bad debts		41,591.40
Net profit for year		$147,647.24
May 31, 1914—Surplus and undivided profits (Exhibit O)		1,106,923.10
Add: Bottling department investment		48,031.47
		$1,302,601.81
Dividends paid		64,000.00
May 31, 1915: Surplus and undivided profits (Exhibit Q)		$1,238,601.81

523

EXHIBIT "Q"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1915

ASSETS

Cash on hand and in bank		$27,240.32
Accounts receivable	$160,276.28	
Loans receivable	64,330.42	
Bills receivable	320,254.57	
		544,861.27

Inventories:			
Materials and supplies		$54,949.78	
Internal revenue		2,083.12	
Lager on hand	$49,596.00		
Ale on hand	17,519.75		
		66,115.75	
			$123,148.65
Investment in bottling department			43,056.99
Deferred charges			3,146.56
Fixed assets:			
Real estate (plant)		$747,629.02	
Real estate (properties)		406,812.76	
Fixtures and machinery		253,523.23	
Vats and casks		61,236.27	
Bottling plant		48,592.33	
Bottling-plant equipment		35,214.90	
Horses		3,800.00	
Wagons, sleighs, and harness		3,412.00	
Automobiles		20,262.51	
Packages		71,656.50	
			1,652,139.52
Total assets			$2,393,593.31

524 LIABILITIES

Accounts payable			$39,052.36
Bills payable			232,555.18
Reserve for bad debts			41,591.40
Discounts and allowances accrued			41,792.56
Capital and surplus:			
Capital stock		$800,000.00	
Surplus	$1,090,954.57		
Undivided profits	147,647.24		
		1,238,601.81	
			2,038,601.81
Total liabilities			$2,393,593.31

EXHIBIT "R"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profit and loss for the fiscal year ending May 31, 1916

Sales:			
Lager and ale			$1,420,020.82
Less: Discount and allowances			272,016.98
Net sales			$1,148,003.84
525 Cost of sales:			
Lager and ale on hand June 1, 1915		$66,115.75	
Materials and supplies		288,220.99	
		$354,336.74	
Less: Lager and ale on hand May 31, 1916		61,514.12	
		$292,822.62	

Plus:		
Productive labor	$61,551.76	
Manufacturing supplies	32,647.27	
Internal revenue	285,985.87	
Total		$673,007.52
Profit from sales		$474,996.32
General expense:		
Loss on bottling department operations	$1,606.02	
Depreciation	67,649.68	
Repairs	23,217.19	
Administrative, selling, and general expense	240,369.16	
Total		332,842.05
Profit from operations		$142,154.27
526 Miscellaneous additions to income:		
Grain sales	$13,317.40	
Ice sales	3,433.17	
Rents	16,023.00	
Interest and exchange	469.34	
Bad debts recovered	9,134.01	
Reserve for bad debts credit	15,154.89	
Total		57,531.81
		$199,686.08
Miscellaneous expense: Reserve for bad debts		72,098.55
Net profit for year		$127,587.53
May 31, 1915: Surplus and undivided profits (Exhibit Q)		1,238,601.81
Gross		$1,366,189.34
Dividends paid		64,000.00
May 31, 1916: Surplus and undivided profits (Exhibit S)		$1,302,189.34

527

EXHIBIT "S"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1916

ASSETS

Cash on hand and in bank		$31,527.52
Accounts receivable	$158,535.86	
Loans receivable	33,572.08	
Bills receivable	323,837.86	
		515,945.80
Inventories:		
Materials and supplies	$47,049.76	
Internal revenue	2,417.25	
Lager on hand $46,650.00		
Ale on hand 14,864.12		
	61,514.12	
		110,981.13
Investment in bottling department		41,450.97
Deferred charges		3,091.98

Fixed assets:		
Real estate (plant)	$747,650.13	
Real estate (properties)	455,896.28	
Fixtures and machinery	252,384.55	
Vats and casks	58,196.32	
Bottling plant	48,592.33	
Bottling plant equipment	34,964.90	
Horses	3,800.00	
Wagons, sleighs, and harness	3,396.00	
Automobiles	21,643.53	
Packages	68,066.42	
		$1,694,590.46
Total assets		$2,397,587.86

528 LIABILITIES

Accounts payable			$25,038.42
Bills payable			151,555.18
Reserve for bad debts			72,098.55
Discounts and allowances accrued			46,706.37
Capital and surplus:			
Capital stock		$800,000.00	
Surplus	$1,174,601.87		
Undivided profits	127,587.53		
		1,302,189.34	
			2,102,189.34
Total liabilities			$2,397,587.86

EXHIBIT "T"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profits and loss for the fiscal year ending May 31, 1917

Sales:			
Lager and ale			$1,546,504.77
Less: Discounts and allowances			297,937.50
Net sales			$1,248,567.27
529 Cost of sales:			
Lager and ale on hand June 1, 1916		$61,514.12	
Materials and supplies		372,383.17	
		$433,897.29	
Less: Lager and ale on hand May 31, 1917		$350,953.66	
Plus:		82,943.63	
Productive labor		63,374.04	
Manufacturing supplies		39,927.40	
Internal revenue		311,281.32	
Total			$765,536.42
Profit from sales			$483,030.85

General expense:		
Depreciation	$71,063.62	
Repairs	24,129.67	
Administrative, selling and general expense	252,138.86	
Total		$347,332.17
Plus: Profit from bottling department operations		7,675.37
Profit from operations		$143,374.05
530 Miscellaneous additions to income:		
Grain sales	$14,553.93	
Ice sales	6,035.28	
Rent	7,011.45	
Interest and exchange	5,701.50	
Bad debts recovered	18,165.13	
Reserve for bad debts credit	42,142.01	
Total		$93,609.30
		$236,983.35
Miscellaneous expense: Reserve for bad debts		111,632.11
Net profit for year		$125,351.24
May 31, 1916—Surplus and undivided profits (Exhibit S)		1,302,189.34
Gross		$1,427,540.58
Dividends paid		64,000.00
May 31, 1917: Surplus and undivided profits (Exhibit U)		$1,363,540.58

531 EXHIBIT "U"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1917

ASSETS

Cash on hand and in bank		$27,301.96
Accounts receivable	$158,765.72	
Loans	40,122.06	
Bills	330,154.24	
		529,042.02
Inventories:		
Materials and supplies	67,120.61	
Internal revenue	1,635.93	
Lager on hand $61,590.00		
Ale on hand 21,353.63		
	82,943.63	
		151,700.17
Investment in bottling department		49,126.34
Deferred charges		3,280.79
Fixed assets:		
Real estate (plant)	$749,835.33	
Real estate (properties)	448,477.49	
Fixtures and machinery	243,851.48	
Vats and casks	57,787.62	
Bottling plant	49,708.33	
Bottling plant equipment	47,943.55	

Fixed assets—Continued.		
Horses	$4,175.00	
Wagons, sleighs, and harness	3,258.00	
Automobiles	16,924.60	
Packages	64,835.35	
		$1,686,796.75
Total assets		$2,447,248.03

532 LIABILITIES

Accounts payable			$44,138.84
Bills payable			83,000.00
Reserve for bad debts			111,632.11
Discounts and allowances accrued			44,936.50
Capital and surplus:			
Capital stock		$800,000.00	
Surplus	$1,238,189.34		
Undivided profits	125,351.24		
		1,363,540.58	
			2,163,540.58
Total liabilities			$2,447,248.03

EXHIBIT "V"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profits and loss for the fiscal year ending May 31, 1918

Sales: Lager and ale			$1,696,212.64
Less: Discount and allowances			241,340.89
Net sales			1,454,871.75
533 Cost of sales:			
Lager and ale on hand June 1, 1917		$82,943.63	
Materials and supplies		398,230.49	
		$481,174.12	
Less: Lager and ale on hand May 31, 1918		74,221.12	
		$406,953.00	
Plus:			
Productive labor		67,086.00	
Manufacturing supplies		58,795.28	
Internal revenue		438,776.02	
Total			$971,610.30
Profit from sales			$483,261.45
General expense:			
Depreciation		$111,634.06	
Repairs		25,015.16	
Administrative, selling, and general expense		255,355.20	
Total			392,004.42
			$91,257.03
Plus: Profit from bottling department operations			24,049.83
Profit from operations			$115,306.86

534	Miscellaneous additions to income:		
	Grain sales	$11,620.88	
	Ice sales	5,165.34	
	Rents	14,003.65	
	Interest and exchange	7,219.17	
	Bad debts recovered	89.25	
	Reserved for bad debts credit	94,391.88	
	Total		$132,490.17
			$247,797.03
	Miscellaneous expense: Reserve for bad debts		$113,431.83
	Net profit for year		$134,365.20
	May 31, 1917: Surplus and undivided profits (Exhibit U)		1,363,540.58
	Gross		$1,497,905.78
	Dividends paid		64,000.00
	May 31, 1918: Surplus and undivided profits (Exhibit W)		$1,433,905.78

535 EXHIBIT "W"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1918

ASSETS

Cash on hand and in bank			$34,042.72
Accounts receivable		$169,610.48	
Loans receivable		65,835.14	
Bills receivable		224,899.33	
			460,344.95
Inventories:			
Materials and supplies		$114,244.86	
Internal revenue		2,227.87	
Lager on hand	$56,169.75		
Ale on hand	18,051.37		
		74,221.12	
			190,693.85
Liberty bonds & W. S. S.			10,832.00
Deferred charges			3,698.78
Investment in bottling department			73,176.17
Fixed assets:			
Real estate (plant)		$742,199.57	
Real estate (properties)		416,565.88	
Fixtures and machinery		238,662.93	
Vats and casks		53,063.40	
Bottling plant		48,991.57	
Bottling plant equipment		38,111.28	
Horses		3,850.00	
Wagons, sleighs, and harness		3,108.00	
Automobiles		16,014.01	
Packages		58,216.05	
			$1,618,782.69
Total assets			2,391,571.16

536 LIABILITIES

Accounts payable			$38,169.72
Bills payable			48,273.00
Reserve for bad debts			31,342.97
Discounts and allowances accrued			39,879.69
Capital and surplus:			
Capital stock		$800,000.00	
Surplus	$1,299,540.58		
Undivided profits	134,365.20		
		1,433,905.78	
			2,233,905.78
Total liabilities			$2,391,571.16

EXHIBIT "X"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Statement of income and profit and loss for the fiscal year ending May 31, 1919

Sales:			
Lager and ale			$2,062,720.78
Less: Discount and allowances			231,002.98
Net sales			$1,831,717.80
537 Cost of sales:			
Lager and ale on hand June 1, 1918		$74,221.12	
Materials and supplies		605,049.31	
		$679,270.43	
Less: Lager and ale on hand May 31, 1919		54,628.25	
		$624,642.18	
Plus:			
Productive labor		87,678.52	
Manufacturing supplies		55,297.27	
Internal revenue		419,534.68	
Total			1,187,152.65
Profits from sales			$644,565.15
General expense:			
Depreciation		$224,801.80	
Repairs		26,624.95	
Administrative, selling, and general expense		278,392.38	
Total			529,818.23
Profit from operations			$114,746.92
538 Miscellaneous additions to income:			
Grain sales		$7,304.77	
Ice sales		4,723.60	
Rents		4,891.57	
Interest and exchange		12,768.32	
Bad debts recovered		5,559.38	
Reserve for bad debts credit		31,342.97	
Profit on sale of properties		5,208.75	
Total			71,799.36
			$186,546.28

Miscellaneous expense:		
Reserve for bad debts	$60,977.25	
Interest and exchange	70.88	
Loss on license	362.50	
Total		$61,410.63
Net profit for year		$125,135.65
May 31, 1918: Surplus and undivided profits (Exhibit W)		1,433,905.78
Gross		$1,559,041.43
Dividends paid	$64,000.00	
Property and loss adjustment	1,634.34	
		65,634.34
May 31, 1919: Surplus and undivided profits (Exhibit Y)		$1,493,407.09

539

EXHIBIT "Y"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1919

ASSETS

Cash on hand and in bank		$248,853.81
Accounts receivable	$163,878.54	
Loans receivable	34,812.08	
Bills receivable	183,735.54	
		382,426.16
Inventories:		
Materials and supplies	32,510.08	
Internal revenue	8,021.25	
Lager on hand	$36,975.50	
Ale on hand	17,652.75	
	54,628.25	
		95,159.58
Liberty bonds and W. S. S.		64,482.00
Deferred charges		4,540.87
Fixed assets:		
Real estate (plant)	$727,227.35	
Real estate (properties)	262,904.73	
Fixtures and machinery	214,958.30	
Vats and casks	47,748.06	
Bottling plant	48,011.74	
Bottling plant equipment	28,608.54	
Horses	1,625.00	
Wagons, sleighs, and harness	2,665.00	
Automobiles	23,075.72	
Packages, bottles, and cases	50,419.00	
		1,407,243.44
Treasury stock		196,700.00
Total assets		2,399,405.88

540

LIABILITIES

Accounts payable	$26,266.57
Loan, Haberle	23,709.69
Accrued labor	638.31

Reserve for bad debts			$14,402.06
Discounts and allowances accrued			40,982.14
Capital and surplus:			
Capital stock		$800,000.00	
Surplus	$1,368,271.44		
Undivided profits	125,135.65		
		1,493,407.00	
			2,295,407.09
Total liabilities			2,399,405.86

541 *Plaintiff's Exhibit 11*

Amen, Surdam & Company, Accountants and Auditors, Liberty Building, Buffalo, N. Y.

ROCHESTER OFFICE, *April 18, 1924.*

Mr. WALTER WELCH,
Attorney at Law, 706 City Bank Building,
Syracuse, N. Y.

DEAR SIR: Pursuant to your request, we have examined the books of the Haberle Crystal Spring Brewing Company, Syracuse, N. Y., and have analyzed and summarized the profit and loss account for its fiscal year ending May 31, 1920, segregating the income accounts of the said fiscal year into two periods, one beginning June 1, 1919, and ending October 31, 1919, the other beginning November 1, 1919, and ending May 31, 1920.

The result of our analysis is illustrated in the exhibits attached hereto designated:

EXHIBIT "A"

Balance sheet as at May 31, 1920

542 EXHIBIT "B"

Statement of income and profit and loss for the fiscal year ending May 31, 1920, segregating into two periods showing the result of the operations in each period

In segregating the result of the operations for the fiscal year ending on May 31, 1920, into the two periods shown in Exhibit "B" above mentioned, it has been necessary, because of the fact that no physical inventory was taken as at October 31, 1919, to apportion the cost of materials and supplies used in the manufacture of the product sold in direct ratio to the amount of sales in each of the two periods covered.

The sales for the period beginning November 1, 1919, and ending May 31, 1920, are the increase in the sales accounts as shown by the books of accounts.

The cost of materials and supplies used for each period has been determined on the basis of the percentage of cost of materials and supplies to gross sales for the full year, the percentage found being applied to the gross sales for each period.

Other items of operating expense, excepting depreciation, are shown by the books of accounts for the two periods.

Depreciation charged off for the full year has been distributed on a monthly basis—i. e., the total amount of depreciation charged off for the year has been divided by 12 and the result multiplied by the number of months in each period.

543 All items of income other than product sales and all deductions from income other than those considered actual operating expenses are shown in miscellaneous additions to income and miscellaneous expense.

We hereby certify that the balance sheet submitted indicates the financial condition of the company as at May 31, 1920, and the statement of income and profit and loss shows the result of the operations of the company for the fiscal year ending on that date as recorded on its books of account, and, in our opinion, the result of the operations for the two periods have been segregated as accurately as can reasonably be accomplished.

Respectfully,

AMEN, SURDAM & COMPANY.

CWS:BB

544 EXHIBIT "A"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Balance sheet as at May 31, 1920

ASSETS

Cash on hand and in bank		$122,093.79
Accounts receivable	$87,146.95	
Loans receivable	21,075.17	
Bills receivable	6,390.84	
R. E. mortgages	125,872.91	
		240,485.87
Inventories:		
Materials and supplies	$47,041.67	
Product on land	22,828.00	
		69,869.67
Liberty bonds & W. S. S.		75,882.00
Deferred charges		7,724.75
Fixed assets:		
Real estate (plant)	$712,682.81	
Real estate (properties)	239,195.11	
Fixtures and machinery	151,370.38	
Vats and casks	30,583.09	
Bottling plant	47,051.51	

Fixed assets—Continued.			
Bottling plant equipment		$26,929.39	
Horses		1,500.00	
Wagons, sleighs, and harness		1,951.00	
Packages, bottles, and cases		39,693.44	
Automobiles		22,050.00	
			$1,273,006.73
Treasury stock			344,700.00
Total assets			$2,133,762.81

545-546 LIABILITIES

Accounts payable			$20,053.97
Discounts and allowances accrued			12,886.34
Reserve for loss of good will			162,779.75
Capital and surplus:			
Capital stock		$800,000.00	
Surplus May 31, 1919	$1,368,271.44		
Undivided profits May 31, 1919	125,135.65		
Total	$1,493,407.09		
Deduct: Dividends paid	$186,447.00		
Loss from Exhibit B	168,917.34		
	355,364.34		
		1,138,042.75	
			1,938,042.75
Total liabilities			$2,133,762.81

EXHIBIT "B"

Statement of income and profit and loss for the fiscal year ending May 31, 1920

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Sales	From June 1, 1919, to October 31, 1919		From November 1, 1919, to May 31, 1920		Combined	
Lager and ale	$1,100,344.79		$270,646.45		$1,370,991.34	
Less: Discount and allowances	85,026.22		11,507.23		96,533.45	
Net sales	$1,015,318.57		$259,139.22		$1,274,457.79	
Cost of sales:						
Lager and ale on hand June 1, 1919					$54,628.25	
Materials and supplies					415,325.19	
					$469,953.44	
Less: Lager and ale on hand May 31, 1920					22,828.00	
	$358,858.72		$88,266.72		$447,125.44	
Plus:						
Productive labor	42,811.77		37,736.71		80,548.48	
Manufacturing supplies	31,822.26		14,851.06		46,673.32	
Internal Revenue	302,264.58		26,474.09		328,738.67	
Total		735,757.33		167,328.58		903,085.91
Profit from sales		$279,561.24		$91,810.64		$371,371.88

EXHIBIT "B"—Continued

Statement of income and profit and loss for the fiscal year ending May 31, 1920—Continued

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.—continued

Sales	From June 1, 1919, to October 31, 1919	From November 1, 1919, to May 31, 1920	Combined
General expense:			
Depreciation	$25,115.63	$35,161.87	$60,277.50
Repairs	25,403.95	13,852.70	39,256.65
Administrative, selling, and general expense	122,171.94	125,387.77	247,553.71
Total	$172,691.52	$174,376.34	$347,067.86
Profit from operations	106,869.72	(Red) 82,565.70	24,304.02
Miscellaneous additions to income:			
Grain sales			3,973.18
Ice sales			15,966.53
Rents			4,885.41
Interest and exchange			16,481.15
Bad debts recovered			5,479.28
Reserve for bad debts credit			14,402.06
Gain on properties			15,574.35
Total			76,761.96
			101,066.98
Miscellaneous expense:			
Reserve for bad debts			52,110.04
Loss on licenses			651.66
Obsolescence of properties			54,441.87
Loss of good will			162,779.75
Total			269,983.32
Net loss for year			(Red) $168,917.34

547 *Plaintiff's exhibit 12*

HABERLE CRYSTAL SPRING BREWING COMPANY

Analysis of earnings from 1908 to 1921

Year 1908, earnings	$112,371.11
" 1909 "	110,803.81
" 1910 "	122,998.19
" 1911 "	130,831.39
" 1912 "	100,064.37
" 1913 "	145,623.02
" 1914 "	235,692.06
" 1915 "	147,647.24
" 1916 "	127,587.53
" 1917 "	125,351.24
" 1918 "	134,365.20
" 1919 "	125,135.65
From June 1, 1919, to Oct. 31, 1919:	
Operating profit	$106,869.72
From Nov. 1, 1919, to May 31, 1920:	
Operating loss	$82,565.70

Average net income prior to March 1, 1913:	
Year ended May 31, 1908, earnings	$112,371.11
Year ended May 31, 1909, earnings	110,803.81
Year ended May 31, 1910, earnings	122,998.19
Year ended May 31, 1911, earnings	130,831.39
Year ended May 31, 1912, earnings	100,664.37
Gross earnings	577,668.87
Average per year	$115,533.77

548 *Average net tangible assets*

Year ended May 31, 1908	$1,461,492.47
Year ended May 31, 1909	1,523,706.08
Year ended May 31, 1910	1,552,324.44
Year ended May 31, 1911	1,619,155.83
Year ended May 31, 1912	1,653,608.05
Gross	7,810,286.87
Average per year	$1,562,057.37
Average annual net income	$115,533.77
Less annual return of 6% on average tangibles of $1,562,057.37	93,723.43
Average annual earnings in excess of 6% on average tangibles	$21,810.34
The excess earnings are a return of 12% per cent on a capital value of	$181,752.83
Accordingly the good will of the H. C. S. B. Co. on Mch. 1, 1913, was worth	$181,752.83

Computations

Allowing 5% return on the average tangibles of $1,562,057.37, and capitalizing the excess annual earnings on the basis of a 6½-year purchase:	
Average earnings	$115,533.77
6% on average tangibles of $1,562,057.37	93,723.43
Excess annual earnings	$21,810.34
549 A 6½-year purchase basis equals an approximate return of 15.3846% on a capital value of	$141,767.21
Good will on March 1, 1913	$141,767.21
Allowing 5% return on the average tangibles of $1,562,057.37 and capitalizing the excess annual earnings on the basis of 8⅓-year purchase:	
Average earnings	$115,533.77
5% on average tangibles of $1,562,057.37=	78,102.86
Excess annual earnings	$37,430.91
An 8⅓-year purchase basis equals an approximate return of 12% on a capital value of	$311,924.25
Good will on March 1, 1913	$311,924.25
Using the same excess annual earnings and capitalizing the same on a 6½-year purchase basis, an approximate return of 15.3846% is indicated on a capital value of good will March 1, 1913	$243,300.91

550 *Plaintiff's Exhibit 13*

AMEN, SURDAM & COMPANY, ACCOUNTANTS AND AUDITORS,
Rochester Office, May 26, 1925.

Mr. WALTER WELCH,
706 City Bank Building, Syracuse, N. Y.

DEAR SIR: Pursuant to your request, we have made an analysis of the real estate, fixtures and machinery, and vats and casks accounts of the National plant, formerly a part of the Haberle Crystal Spring Brewing Company.

Our analysis, which covered the period from the date of acquisition of the National plant at or about January 1, 1905, to October 31, 1919, was made for the purpose of (1) establishing an approximate fair market value as at March 1, 1913, of the properties named, and (2) determining the approxi'ate residual investment remaining in these properties at or about October 28, 1919.

In the course of our analysis we found—

(1) That the real-estate account as carried on the books of the company represents the land and building value of the National plant combined, no separate cost for land and building having been set up at any time during which this property remained in the possession of the Haberle Crystal Spring Brewing Company;

551 (2) That prior to May 31, 1918, no provision for the depreciation of the building had been made;

(3) That all charges to the accounts subsequent to the date of acquisition represented the cost of additions made to the properties and that credits thereto other than those identified as depreciation represented scrap salvage;

(4) That while no provision had been made for the depreciation of the buildings, provision for this contingency has been regularly made and credited to the fixtures and machinery and vats and casks accounts, so that the balances of these accounts at the close of each accounting period represent their approximate residual cost value.

To illustrate the result of the analysis made, we are submitting herewith the following:

Exhibit "A"—Transcript of the real estate account taken from the books;

Exhibit "B"—Schedule of the real estate account showing the cost and approximate depreciation sustained on the buildings during the time these remained in the possession of the company;

Exhibit "C"—Transcript of the fixtures and machinery account taken from the books;

Exhibit "D"—Transcript of the vats and casks account taken from the books.

In Exhibit "A" the March 1, 1913, book value of the real estate will be found to be $340,731.88 and the October 28, 1919, value $346,950.75.

552 As Exhibit "A" shows the undepreciated cost of the buildings, we have compiled Exhibit "B," where provision for depreciation has been made, and where the March 1, 1913, fair value of the buildings will be found to be $286,748.60 and the October 28, 1919, value $251,656.31.

In Exhibit "A" the values shown include both land and building, whereas in Exhibit "B" the values have been segregated as explained in the foot notes.

In Exhibit "C" the March 1, 1913, depreciated value of the fixtures and machinery will be found to be $121,779.88 and the October 28, 1919, depreciated value $96,966.48.

In Exhibit "D" the March 1, 1913, depreciated value of vats and casks will be found to be $16,629.44 and the October 28, 1919, value $15,296.51.

Summarizing the figures shown in the exhibits submitted, the March 1, 1913, fair value of the properties in question is as follows:

Land	$21,649.52
Buildings	265,099.08
Fixtures and machinery	121,779.88
Vats and casks	16,629.44
Total	$425,157.92

The unrecovered cost of the properties as at October 28, 1919, is as follows:

553 Land	$21,649.52
Buildings	251,656.31
Fixtures and machinery	96,966.48
Vats and casks	15,296.51
Total	$385,568.82

Respectfully submitted.

AMEN, SURDAM & COMPANY.

CWS/BB

EXHIBIT "A"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Transcript of National real-estate account

Ledger folio	Dr.	Cr.	Balance Dr.	Balance Cr.
Jan. 3, 1905—A–64	$323,106.24		$323,106.24	
May 31, 1905—A–64	1,342.87		324,449.11	
May 31, 1906—A–64	945.66		325,394.77	
May 31, 1907—B–50	1,826.05		327,220.82	
Jan. 6, 1908—B–50		$1,000.00		
May 31, 1908—B–50	4,313.33		330,534.15	

May 31, 1909—B–50	$150.92		$330,685.07
May 31, 1910—B–50	402.15		331,087.22
May 31, 1911—B–50	885.33		331,972.55
May 31, 1912—B–50	7,280.38		339,252.93
Feb. 28, 1913—Construction—B–45	1,478.95		340,731.88
554 May 31, 1913—Bal. construction—B–45	4,202.07		344,933.95
May 31, 1914—C–58	11,030.35		355,964.30
May 31, 1915—C–58	1,530.93		357,495.23
May 31, 1916—C–58	21.11		357,516.34
May 31, 1917—C–58	1,387.28		358,903.62
May 31, 1918—C–58	144.32		
May 31, 1918—Depreciation—C–58		$4,885.72	354,162.22
May 31, 1919			
Apl. 11, 1919—Tax on payment		7.81	
Apl. 11, 1919—Refund		136.10	
May 31, 1919	13.07		
May 31, 1919—Depreciation		7,080.63	346,950.75
Oct. 28, 1919—Balance			346,950.75

EXHIBIT "B"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Cost of National real estate and depreciation sustained

Depreciation sustained computed in accordance with it: 1158

Rate 2%	Cost	1905	1906	1907	1908	1909	1910	1911	1912	1913 to 2-28	Total
Jan. 3, 1905— cost	(A) $323,106.24	$2,692.55	$6,462.12	$6,462.12	$6,462.12	$6,462.12	$6,462.12	$6,462.12	$6,462.12	$4,846.59	$52,773.98
May 31, 1905—1905 additions "	1,342.87	11.19	26.85	26.85	26.85	26.85	26.85	26.85	26.85	20.14	219.28
" 31, 1906—1906 " "	945.66		9.45	18.91	18.91	18.91	18.91	18.91	18.91	14.18	137.09
" 31, 1907—1907 " "	1,826.05			18.26	36.52	36.52	36.52	36.52	36.52	27.39	228.25
" 31, 1908—1908 " "	3,313.33				33.13	66.26	66.26	66.26	66.26	49.69	347.86
" 31, 1909—1909 " "	150.92					1.50	3.01	3.01	3.01	2.26	12.79
" 31, 1910—1910 " "	402.15						4.02	8.04	8.04	6.03	26.13
" 31, 1911—1911 " "	885.33							8.85	17.70	13.27	39.82
" 31, 1912—1912 " "	7,280.38								77.80	109.20	187.00
Feb. 28, 1913—Additions to Feb. 28, 1913	1,478.05									11.08	11.08
Totals	$340,731.88	$2,703.74	$6,498.42	$6,526.14	$6,577.53	$6,612.16	$6,617.69	$6,630.56	$6,717.21	$5,099.83	$53,983.28
Cost to 2/28/1913	(B) $340,731.88										
Less: Depreciation sustained	(C) 53,983.28										
March 1, 1913, fair value	(D) $286,748.60										

(A) $323,106.24—Represents the cost of land and buildings at acquisition.
(B) 340,731.88—Represents the cost of land and buildings as Feb. 28, 1913.
(C) 53,932.28—Represents depreciation sustained from date of acquisition to Feb. 8, 1913. Depreciation is computed on total cost for the reason that no approximate segregation of land and buildings could be made.
(D) 286,748.60—Represents the March 1, 1913, fair value of the property. In the year 1912 we are informed that the property was assessed at $7,800.00 for land and $95,500.00 for buildings, the percentage to the whole being 7.55% for land and 92.45% for buildings. To arrive at an approximate building value as at March 1, 1913, we have applied the percentage shown to the March 1, 1913, fair market value with the result that

EXHIBIT "B"—Continued

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.—continued

			1913	1914	1915	1916	1917	1918	1919	Total
Segregated into land and buildings:										
March 1, 1913, land value	(E) 21,649.52									
March 1, 1913, building value	(F)	$265,099.08	$1,325.49	$5,301.98	$5,301.98	$5,301.98	$5,301.98	$5,301.98	$2,209.16	$30,044.55
May 31, 1913—1913 additions to 5/31 cost		4,202.07	10.55	84.04	84.04	84.04	84.04	84.04	35.02	465.77
" 31, 1914—1914 additions "		11,030.35		110.30	220.60	220.60	220.60	220.60	91.91	1,084.61
" 31, 1915—1915 " "		1,530.93			15.30	30.61	30.61	30.61	12.75	119.88
" 31, 1916—1916 " "		21.11				.21	.42	.42	.17	1.22
" 31, 1917—1917 " "		1,387.28					13.87	27.74	11.56	53.17
" 31, 1918—1918 " "		144.32						1.44	1.20	2.64
Oct. 28, 1918—1919 " to 10/28		13.07							.06	.06
Cost 10/28/19 from 3-1-13 value	(G)	$283,428.21	$1,336.04	$5,496.32	$5,621.92	$5,637.44	$5,651.52	$5,666.83	$2,361.83	$31,771.90
Less: Depreciation to 10-28-19	(H)	31,771.90								
Residual value in buildings 12-28-19	(I)	$251,656.31								

(E) 21,649.52—Represents the March 1, 1913, land value and
(F) 265,099.08—Represents the March 1, 1913, building value. To this we have added subsequent additions at cost, the total
(G) 283,428.21—Represents the undepreciated value of the buildings as at October 28, 1919. Depreciation sustained computed from March 1, 1913, to October 28, 1919, results in
(H) 31,771.90—which, deducted from (G), indicated a net residual building value as at October 28, 1919, of
(I) 251,656.31—invested in the National plant buildings.

555-556

EXHIBIT "C"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Transcript of fixtures and machinery account

	Ledger folio	Dr.	Cr.	Balance Dr.	Balance Cr.
Jan.	3, 1905—A—80	$114,558.74		$114,558.74	
Jan.	30, 1905—A—80		$985.00		
Jan.	30, 1905—A—80	4,055.00		117,628.74	
To Apr.	29, 1905—A—80	1,436.12			
To May	11, 1905—A—80		941.00		
May	31, 1905—A—80		2,004.77		
May	31, 1905—A—depreciation		1,451.50	114,667.59	
To Nov.	8, 1905—A—81		550.00		
May	31, 1906	113.98			
May	31, 1906, depreciation		3,427.55	110,824.02	
Aug.	8, 1906—B—54		10.57		
Apr.	2, 1907		3.33		
To May	31, 1907	10,363.77			
To May	31, 1907, depreciation		3,635.22	117,538.67	
July	18, 1907		9.45		
Dec.	4, 1907		15.00		
May	6, 1908		8.00		
To May	31, 1908	7,311.84			
May	31, 1908, depreciation		3,744.54	121,073.52	
	Sept. 30, 1908		14.40		
557 To May	31, 1909	2,851.70			
	May 31, 1909, depreciation		3,717.32	120,193.50	
To Dec.	3, 1909		61.35		
Apr.	26, 1910		35.00		
To May	31, 1910	16,232.58			
May	31, 1910, depreciation		18,162.15	118,167.58	
To Aug.	25, 1910		55.25		
To Mar.	24, 1911		23.30		
To May	31, 1911	6,050.43			
May	31, 1911—B—55 Depreciation		5,300.43	118,839.03	
Sept.	18, 1911		15.00		
To May	21, 1912		48.30		
To May	31, 1912	3,610.80			
May	31, 1912, depreciation		3,671.59	118,714.94	
To Dec.	24, 1912		32.26		
To Feb.	28, 1913	7,858.39			
Feb.	28, 1913, depreciation *		4,761.19	121,779.88 (A)	
To May	31, 1913	424.17			
May	31, 1913—Bal. Depreciation		1,587.07	120,616.98	

(A) 121,779.88—Represents the book value of fixtures and machinery as at March 1, 1913.

(B) 96,966.48—Represents the book value of fixtures and machinery at as October 28, 1919.

558	May 31, 1913—C—62	120,616.98			
	To Oct. 8, 1913		207.90		
	May 21, 1914		18.59		
To May	31, 1914	7,550.60			
	May 31, 1914, depreciation		12,794.10	115,146.99	

* Represents 9/12 of the amount of $6,348.26 charged off on May 31, 1913.

Ledger folio	Dr.	Cr.	Balance Dr.	Balance Cr.
To Dec. 17, 1914		$63.00		
To Apr. 15, 1915		38.58		
To May 31, 1915—C—63	$8,277.69			
May 31, 1915, depreciation		6,166.15	$117,156.95	
June 11, 1915		75.00		
Jan. 11, 1916		278.62		
To May 31, 1916	5,408.43			
May 31, 1916, depreciation		6,110.59	116,101.17	
Aug. 22, 1916—C—64		35.00		
Aug. 31, 1916		1,400.00		
To May 31, 1917	4,472.42			
May 31, 1917, depreciation		5,956.93	113,181.66	
Dec. 27, 1917		82.45		
To May 31, 1918	141.25			
May 31, 1918, depreciation		5,662.03	107,578.53	
Aug. 23, 1918		125.00		
To May 31, 1919	287.00			
May 31, 1919, depreciation		10,774.07	96,966.48	
Oct. 28, 1919—Balance				96,966.48(B)

559

EXHIBIT "D"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Transcript of vats and casks account

Ledger folio	Dr.	Cr.	Balance Dr.	Balance Cr.
Jan. 1, 1905—A—111	$22,546.20		$22,546.20	
Jan. 30, 1905	2,200.00			
Feb. 28, 1905	87.75			
Apl. 7, 1905	6.76			
May 31, 1905 H. C. S. B. Co		5,636.55	19,873.40	
To Sept. 30, 1905		979.32		
Jan. 6, 1906		1,300.00		
To Apl. 20, 1906	323.06			
May 31, 1906, depreciation		1,791.71	16,125.43	
To Oct. 27, 1906—B—70		460.00		
To May 31, 1907	208.35			
May 31, 1907, depreciation		1,587.37	14,286.41	
Mch. 19, 1908	250.00			
Apl. 30, 1908		3.00		
May 31, 1908, depreciation		1,453.34	13,080.07	
Aug. 14, 1908		40.00		
Feb. 13, 1909	5.00			
To May 4, 1909		455.00		
May 31, 1909, depreciation		1,259.00	11,331.07	
Jan. 24, 1910	394.60			
560 Feb. 14, 1910	71.66			
Apl. 2, 1910		12.00		
May 31, 1910, depreciation		1,178.53	10,606.80	
Nov. 30, 1910	6,810.00			
May 31, 1911	450.80			
May 31, 1911, depreciation		530.34	17,257.26	
Oct. 7, 1911		85.00		
Apl. 25, 1912	911.40			
May 31, 1912, depreciation		904.18	17,179.48	
To Dec. 24, 1912		67.00		

To Dec. 31, 1912	$164.88			
Feb. 28, 1913, depreciation*		$647.92	$16,629.44(A)	
May 31, 1913—Bal. of depreciation		215.97	16,413.47	

(A) 16,629.44—Represents the book value of vats and casks as at Mch. 1, 1913.

(B) 15,296.51—Represents the book value of vats and casks as at Oct. 28, 1919.

561 EXHIBIT "D"

HABERLE CRYSTAL SPRING BREWING COMPANY, SYRACUSE, N. Y.

Transcript of vats and casks account

Ledger folio	Dr.	Cr.	Dr.	Cr.
May 31, 1913—C—72	$16,413.47			
June 17, 1913		$20.00		
To May 31, 1914	4,616.00			
May 30, 1914. depreciation		1,050.47	$19,959.00	
To May 31, 1915	202.16			
May 31, 1915, depreciation		1,008.06	19,153.10	
To May 31, 1916	83.00			
May 31, 1916, depreciation		961.80	18,274.30	
Oct. 30, 1916		5.25		
Dec. 30, 1916	2,668.00			
May 31, 1917, depreciation		1,046.85	19,890.20	
May 31, 1918, depreciation		2,884.08	17,006.12	
Nov. 8, 1918		10.00		
May 31, 1919, depreciation		1,699.61	15,296.51	
Oct. 28, 1919—Balance			15,296.51(B)	

562 *Statement re plaintiff's Exhibit 14*

This is a statement showing the number of assignments and powers of attorney over liquor tax certificates in the city of Syracuse, N. Y., held by the plaintiff on May 31, 1913, giving the name of the person who executed the same and the location of the property, said certificates being of the series of 1912 and 1913 and being 130 in number the same as Exhibit 6, except that the name of the persons executing and the location of the certificated premises are different.

Statement re plaintiff's Exhibit 15

This is a statement showing the number of assignments and powers of attorney over liquor tax certificates in the city of Syracuse, N. Y., held by the plaintiff on January 30, 1918, giving the name of the person who executed the same and the location of the property, said certificates being of the series of 1917 and 1918 and being 131 in number the same as Exhibit 6, except that the name of the persons executing and the location of the certificated premises are different.

*Represents 9/12 of the amount $863.89 charged off on May 31, 1913.

563 *Statement re plaintiff's Exhibit 16*

This is 130 powers of attorneys in effect in 1913 and 131 in effect in 1918 the same as Exhibit 6, except that the name of the person executing it and the location of the certificated premises are different.

Statement re plaintiff's Exhibit 17

This is a statement showing the number of assignments and powers of attorney over liquor tax certificates in the city of Syracuse, N. Y., held by the plaintiff on Oct. 3, 1918, giving the name of the person who executed the same and the location of the property, said certificates being of the series of 1918 and 1919 and being 103 in number the same as Exhibit 6, except that the name of the persons executing and the location of the certificated premises are different.

Statement re plaintiff's Exhibit 18

This is 103 assignments and powers of attorney held by the plaintiff in the city of Syracuse, N. Y., in effect on October 3, 1918, being the same as Exhibit 6, except that the name of the persons executing it and the location of the certificated premises are different.

564 *Statement re defendant's Exhibit 1*

This is the substance of a clause inserted in the deed of different premises sold by the plaintiff after prohibition went into effect.

"It is agreed that for a period of ten years from the date of the deed, that the grantee in the deed will draw, use, sell, and serve on the premises exclusively, the soft drinks manufactured and sold by plaintiff, providing the traffic therein was carried on on said premises and provided further that said plaintiff continue to manufacture and sell same and pay for the same at its agreed price or market value in the city of Syracuse at the time of delivery."

565 *Stipulation re transcript of record*

It is hereby stipulated that the foregoing is a true transcript of the writ of error, summons, complaint, answer, extract from the clerk's minutes, judgment, bill of exceptions, petition for writ of error, assignments of error, supersedeas bond, citation, exhibits, orders, exceptions, and all papers made up to be transmitted to the United States Circuit Court of Appeals, Second Circuit, as the return to the writ of error sued out by the plaintiff in error in the above-entitled action and contains all of the evidence, records, papers, and

documents in this action that are necessary and material upon the review of this judgment by the Circuit Court of Appeals for the second judicial circuit, and that the same may be certified without further comparison by the clerk of the United States District Court as the complete return herein, which shall constitute full compliance with the said writ of error.

It is further stipulated that either party to this action may upon appeal herein, produce and use upon the argument or arguments before the Appellate Court or courts any, all, or either of the original exhibits received or offered in evidence upon the trial of this action and any other order, request, paper or record used and
566 filed which is material upon the appeal herein taken or which may be hereafter taken.

Dated June 7th, 1928.

WELCH & WELCH,
Attorneys for Plaintiff and Plaintiff in Error.
OLIVER D. BURDEN,
U. S. Attorney, Attorney for Defendant in Error.

[Clerk's certificate to foregoing transcript omitted in printing.]

568 In United States Circuit Court of Appeals for the Second Circuit

No. 89—October term, 1928

Argued December 3, 1928. Decided January 14, 1929

HABERLE CRYSTAL SPRINGS BREWING Company, plaintiff in error v. JESSE W. CLARKE, COLLECTOR OF internal revenue for the twenty-first district, New York, defendant in error	In error to the District Court of the United States for the Northern District of New York

Before MANTON, L. HAND, and SWAN, circuit judges

Opinion

Writ of error to the District Court of the United States for the Northern District of New York.

Suit to recover income and profits taxes paid under protest by plaintiff to defendant for the fiscal year ending May 31, 1919. By

stipulation a jury was waived and the case tried before a referee, who reported his findings of fact and conclusions of law in favor of recovery by the plaintiff of the amount sued for. The district court disapproved the referee's conclusions of law, dismissed the complaint, and entered judgment for costs for the defendant. From this judgment the plaintiff appeals. Reversed.

Welch & Welch, of Syracuse, N. Y. (Arthur A. Ballantine and George E. Cleary, both of New York City, of counsel), for plaintiff in error.

Oliver D. Burden, U. S. atty., of Syracuse, N. Y. (C. M. Charest, gen. counsel, Bureau of Internal Revenue, and T. H. Lewis, jr., sp. atty., Bureau of Internal Revenue, of counsel), for defendant in error.

SWAN, circuit judge (after stating the facts as above). The plaintiff is a New York corporation, which during its fiscal year ending May 31, 1919, and for many years prior thereto, was profitably engaged in the manufacture and sale of lager beer and ale. Its taxes for 1919 were computed without allowing any deduction for obsolescence of its good will, due to the imminence of national prohibition legislation. Such taxes were paid under protest, a claim for refund was filed and rejected, and this action was then brought to recover the sum of $16,618.08 and interest thereon from date of payment, July 6, 1922.

The referee found as a fact, and it is apparently conceded by defendant, that on and after January 31, 1918, it was reasonably apparent that prohibition legislation would be adopted, although the eighteenth amendment did not become effective until January 16, 1920. It was found that the value of plaintiff's good will on March 1, 1913, was $174,482.64, and that the value of its good will was wholly destroyed by prohibition legislation. A deduction of $89,071.55 for the fiscal year 1919 was agreed by the parties to be the correct amount to deduct, if any deduction for obsolescence of good will were allowable. The referee's finding on this subject is as follows:

"The parties hereto have agreed that if any deduction from plaintiff's income for the fiscal year 1919 for obsolescence of good will is allowable under the statute, such deduction shall be 365/715 of the value of such good will on March 1, 1913. The numerator of the fraction is the number of days in the fiscal year 1919; the denominator of the fraction is the number of days from January 31, 1918, to January 16, 1920. The Commissioner of Internal Revenue has decided that by January 31, 1918, it became reasonably apparent that national prohibition would be adopted. The prohibition
569 amendment to the Constitution became effective on January 16, 1920. The deduction for obsolescence of good will in the fiscal year 1919 on this basis is $89,071.55."

The deduction is claimed by virtue of section 234(a) (7) of the revenue act of 1918 (40 Stat. 1077):

"Sec. 234(a). That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions: * * *

"(7) A reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *"

The sole question presented to us is whether this provision of the statute permits a taxpayer to deduct from his gross yearly income any allowance for the obsolescence of the good will of his business during such year, because the good will has become of limited duration by the imminence of legislation which will prohibit the business.

The plaintiff contends that the word "property" in the section above quoted is used in an unrestricted sense, as stated in Lynch v. Alworth-Stephens Co., 267 U. S. 364, 369, 45 S. Ct. 274 (69 L. Ed. 660), so that when, in fact, plaintiff's good will became of limited duration, it was as much the subject of an exhaustion or obsolescence deduction as any other kind of property. The lower court, however, held that "good will * * * is not the kind of property meant by section 234(a) (7)." (D. C.) 20 F. (2d) 540. In reaching this conclusion the court relied largely upon the authority of two cases in the eighth and ninth circuits. Red Wing Malting Co. v. Willcuts, 15 F. (2d) 626 (C. C. A. 8) 49 A. L. R. 459; Landsberger v. McLaughlin, 26 F. (2d) 77 (C. C. A. 9). We shall first approach the problem without reference to authority, and will then take up the cases which have passed upon it.

Light upon the meaning of the section may be gained by considering the corresponding provision of the revenue act of 1916. Under section 12(a) of this act (39 Stat. 768) the deduction permitted was "a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade." The revenue act of 1918 struck out the phrase "arising out of its use or employment in the business or trade," and substituted therefor "used in the trade or business, including a reasonable allowance for obsolescence." Thus, while under the earlier act deduction was allowed only when the exhaustion or wear and tear of the property resulted from its use in the business, under the later statute exhaustion, wear and tear is defined to include obsolescence, and such exhaustion or obsolescence may result from any cause, provided only that it occurs with respect to property used in the business.

The purpose of this change of language would seem to be to permit an allowance for the loss in value of a business asset due to causes unconnected with its physical exhaustion by use, such as new inventions superseding it in the art, or new legislation prohibiting

its use in the business. The shortening of the useful economic or commercial life of an asset before the end of its physical life is best described by the term "obsolescence." A brewery may fairly be regarded as obsolete after prohibition, and as subject to obsolescence during the period between the date when such legislation became certain and the date when it went into effect. The taxing authorities do not deny that legislation which shortens the useful life of tangible assets entitles the taxpayer to an allowance for obsolescence under the 1918 act. Appeal of Manhattan Brewing Co., 6 B. T. A. 952, which allowed obsolescence of tangibles, but not of good will, because of the imminence of prohibition.

Concededly good will is property—intangible, it is true, but that of itself does not exclude it from the section. Many forms of intangible property are admittedly subject to exhaustion or obsolescence, within the meaning of the revenue act of 1918. This was clearly recognized by the commissioner in the regulations which were promulgated under the authority of section 1309 (40 Stat. 1143; 26 USCA § 1254). Article 163 of Regulations 45 (1920 Edition) provides:

"Depreciation of Intangible Property.—Intangibles, the use of which in the trade or business is definitely limited in duration, may be the subject of a depreciation allowance. Examples are patents and copyrights, licenses, and franchises. Intangibles, the use of which in the business or trade is not so limited, will not usually be a proper subject of such an allowance. If, however, an intangible asset acquired through capital outlay is known from experience to be of value in the business for only a limited period, the length of which can be estimated from experience with reasonable certainty, such intangible asset may be the subject of a depreciation allowance, provided the facts are fully shown in the return or prior thereto to the satisfaction of the commissioner."

Article 167 of Regulations 45 relates specifically to depreciation allowances in the case of patents and copyrights. That rights under patents, leases, and contracts of limited duration may be exhausted by the passage of time, and that the taxpayer is entitled to deduct a reasonable allowance for such exhaustion, seems to be well settled. As to patents, see Van Kannel Revolving Door Co. v. Commissioner, 11 B. T. A. 1209; Perfect Window Regulator Co. v. United States, 66 Ct. Cl. —, June 18, 1928. As to leases, see Lynch v. Alworth-Stephens Co., 267 U. S. 364, 45 S. Ct. 274, 69 L. Ed. 660; Philip Henrici Co. v. Reinecke, 3 F. (2d) 34 (D. C. N. D. 111); Kaufman-Straus Co. v. Lucas, 12 F. (2d) 774 (C. C. A. 6); Appeal of Grosvenor Atterbury, 1 B. T. A. 169; Appeal of Secor Hotel Co., 7 B. T. A. 158; Hawaiian Sugar Co. v. Commissioner, 13 B. T. A. 683. As to contracts, see International Curtis Marine Turbine Co. v.

United States, 63 Ct. Cl. 597; Kentucky Tobacco Products Co. v. Lucas, 5 F. (2d) 723 (D. C. W. D. Ky.); Lassen Lumber & Box Co. v. Blair, 27 F. (2d) 17 (C. C. A. 9); Appeal of Atlantic Carton Corp., 2 B. T. A. 380. Consequently, if good will is to be distinguished from other intangibles in this respect, some reason must be found for the distinction.

The referee has found that on January 31, 1918, it was reasonably certain that prohibition legislation would be adopted in the near future, and that after the prohibition amendment became effective, on January 16, 1920, the plaintiff's good will came to an end. Consequently, on January 31, 1918, it became known that the plaintiff's good will would terminate in 715 days. If any one had purchased plaintiff's brewery and good will on that date, paying, for illustration, $50,000 for the good will, why should not that capital investment of $50,000 be depreciated during the limited period of the life of the asset purchased, just as would be done in the case of the purchase price of a patent or a lease having still 715 days to run? In each case the owner has full and continuous enjoyment while his right endures. It is a convention to say that the asset is used up day by day, a convention adopted to spread the loss equitably. The patentee's rights, or the lessee's, are as complete in the last year as before; only they will come to an end, like this good will. To us the cases seem precisely alike in this regard, and that every consideration which justifies spreading the loss in one case justifies spreading it in the other.

It is argued that the statute should be confined to assets of a nature such that when originally acquired they will waste. The good will which plaintiff owned on March 1, 1913, was apparently of unlimited duration. Only by subsequent events did it become known that its life was limited. The date when an asset originally imperishable becomes perishable, and the length of life then to be ascribed to it, may well be difficult of proof; but in the instant case these facts were settled by agreement. Granted that on a given date plaintiff's good will did become limited to a life of approximately 2 years, what is there in the language of section 234 to exclude its application to such property? We see nothing.

As already pointed out, obsolescence is often of that very type. A machine may have an apparent life of 20 years when it is purchased, and for 10 years nothing may appear in the art which successfully competes with it; then a new invention may enter the field, which renders the machine obsolete in 2 years. It can scarsely be doubted that, while during the first 10 years depreciation would have been allowed at the rate of 5 per cent per year, the remaining 50 per cent of its cost would be permitted to be written off during the last 2

years of its useful economic life. In principle, we see no difference between the hypothetical case just stated and the application of the section to an asset which was originally thought to be of indefinite duration but by change of legislation becomes of limited life.

It is further urged that good will differs from other property subject to depreciation allowance, because good will has no existence except in connection with a going business and can not be transferred apart from it. Of course, that is true; but its materiality to the present issue is not apparent. A going business has a value over and above the aggregate value of the tangible property employed in it. Such excess of value is nothing more than the recognition that, used in an established business that has won the favor of its customers, the tangibles may be expected to earn in the future as they have in the past. The owner's privilege of so using them, and his privilege of continuing to deal with customers attracted by the
571 established business, are property of value. This latter privilege is known as good will. It can, it is true, be exercised only in connection with the exercise of the former; hence it can not be separately assigned, and legislation which cuts short the use of tangibles in the business necessarily limits also the good will. Every consideration which justifies allowance for the "obsolescence" of the tangibles, because of compulsory future discontinuance of the business, ought to create a similar allowance for the good will.

Thus, as a matter of construction, unaffected by authority, we think the statute permits allowance for the obsolencence of plaintiff's good will. We should entertain some doubt whether the value of the good will on March 1, 1913, rather than its 1918 value, when it first became of limited duration, were the proper measure of the value to be written off during the period of obsolescence; but the concession, as found by the referee, has eliminated that question.

We will now consider the problem in the light of the decisions. As pointed out in the Red Wing Case, supra, the taxing authorities have decided the question both ways. In T. B. R. 44, 1 C. B. 133 (1919), the Advisory Tax Board ruled that distillers were entitled under the revenue act of 1918 to an allowance for obsolescence of good will, trade-marks, and trade-names because of the destruction of the value of such assets by prohibition legislation. In O. D. 298, 1 C. B. 138 (1919), a similar ruling was applied to brewers. A formula for the computation of good will values was set forth in Appeals and Review Memorandum 34. See 2 C. B. 31 (1920). Subsequently, however, the bureau overruled its original interpretation of the statute, and ceased to allow deductions for obsolescence of a brewer's good will.

The first court decision is the Red Wing Case, in the eighth circuit. Circuit Judge Kenyon gave the problem very careful and exhaustive consideration. He concluded that section 234(a)(7) "limits the allowance for obsolescence to such property as is susceptible to exhaustion, wear, and tear by use in the business, and good will is not such property." Page 633 of his opinion as reported in 15 F. (2d). Following this decision a majority of the Board of Tax Appeals, over a forceful and able dissent, decided Appeal of Manhattan Brewing Co., 6 B. T. A. 952, already referred to. To this ruling the board has adhered in numerous subsequent cases. The only other court decision is Landsberger v. McLaughlin, supra, in which the ninth circuit merely followed the Red Wing Case.

Much as we respect the considered decisions of other circuits, we conceive that our duty requires us to form an independent judgment in cases of first impression in our own court, and forbids us blindly to follow other circuits, when our minds are not persuaded by the arguments advanced. Particularly in cases of a character such as this, diversity of view between the circuits is not a serious objection, for the Supreme Court will then exercise its appropriate function of taking up the question and determining the proper interpretation of an important section of the tax law. It is true that the Supreme Court refused certiorari in the Red Wing Case, 273 U. S. 763, 47 S. Ct. 476, 71 L. Ed. 879, but they have often warned that no inference is to be drawn from such a refusal. Consequently, we feel at liberty to decide the question independently.

For the reasons stated, the judgment below was erroneous. It is accordingly reversed, and the cause remanded, with directions to enter judgment for the plaintiff upon the referee's report.

572 In United States Circuit Court of Appeals, Second Circuit

[Title omitted.]

Decree filed Jan. 21, 1929

Error to the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and cause remanded with directions to enter judgment for the plaintiff upon the referee's report.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

M. T. M.
L. H.

573 [File indorsement omitted.]

574 [Clerk's certificate to foregoing transcript omitted in printing.]

575 SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed May 13, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34,156. United States Circuit Court of Appeals, Second Circuit. Term No. 847. Jesse W. Clarke, collector of internal revenue for the Twenty-first District of New York, petitioner, vs. The Haberle Crystal Springs Brewing Company. Petition for writ of certiorari and exhibit thereto. Filed April 19th, 1929. File No. 34,156.

○

Office Supreme C
APR 19

FILE COPY

No. [redacted] 68

In the Supreme Court of the United States

OCTOBER TERM, 1928

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE 21ST DISTRICT OF NEW YORK, PETITIONER

v.

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

U.S. GOVERNMENT PRINTING OFFICE: 1929

INDEX

	Page
Petition:	
Statement	2
Specification of errors to be urged	3
Reasons for granting the writ	3
Brief in support of petition:	
Opinions below	5
Jurisdiction	5
Question presented	5
Statute involved	5
Statement	6
Argument	6
Conclusion	8
Appendix	9

CITATIONS

Eberlin. Co., Fred, 8 B. T. A. 1107	7
Garneau Co., Inc., Joseph, 8 B. T. A. 1041	7
Landsberger v. *McLaughlin*, 26 F. (2d) 77	4, 6
Manhattan Brewing Co., 6 B. T. A. 952	8
Red Wing Malting Co. v. *Willcuts*, 15 F. (2d) 626 (certiorari denied 273 U. S. 763)	4, 6
Renziehausen v. *Commissioner*, 8 B. T. A. 87	7
Renziehausen v. *Commissioner* (C. C. A. 3rd), decided March 7, 1929	4, 9
Revenue Act of 1918, c. 18, Sec. 234 (a) (7), 40 Stat. 1057, 1077	5, 6

46431—29——1

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. ——

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE for the 21st District of New York, petitioner

v.

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Attorney General, on behalf of Jesse W. Clarke, Collector of Internal Revenue for the 21st District of New York, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on the 21st day of January, 1929 (R. 573), reversing the judgment of the District Court for the Northern District of New York (R. 398).

STATEMENT

The question presented is whether Section 234 (a) (7) of the Revenue Act of 1918 entitles the petitioner in computing its taxable net income for the fiscal year ending May 31, 1919, to take a deduction on account of obsolescence of good will in its brewing business which was proscribed by Federal legislation.

Subdivision (a) (7) allows a reasonable deduction for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

Respondent, a New York corporation, was during the fiscal year ended May 31, 1919, and for many years prior thereto, engaged in the manufacture and sale of lager beer and ale. On October 29, 1919, it was compelled to discontinue its business by Federal legislation restricting the use of cereals in the manufacture of beer and ale. (R. 365.) This law was of a temporary character, but in 1920, and before the temporary restrictions had been withdrawn, the constitutional amendment prohibiting the manufacture and sale of alcoholic beverages was adopted, thus permanently destroying the business of respondent. The findings show that after January 31, 1918, it was reasonably apparent that National Prohibition would be adopted. (R. 373.)

Petitioner contended in the courts below that the depreciation of its good will, valued at $174,482.64, was an allowable deduction as obsolescence under Section 234 (a) (7) of the Revenue Act of 1918.

(R. 369, 373.) The Government contended to the contrary. (R. 368.)

A jury trial was waived by a written stipulation, and the case was by stipulation of counsel and order of court referred to a referee for the taking of testimony. (R. 363.) On the report of the referee and his findings of fact, the District Court entered judgment in favor of the defendant collector. (R. 398.) From this judgment a writ of error was sued out to the Circuit Court of Appeals (R. 1), which court reversed the judgment of the District Court and remanded the cause with directions to enter judgment for the plaintiff upon the referee's report (R. 573).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the respondent was entitled to a deduction under Section 234 (a) (7) of the Revenue Act of 1918 on account of the exhaustion, wear and tear, or obsolescence or loss of its good will from its gross income for the fiscal year ending May 31, 1919, since the good will was not property of such a nature that it was decreased by exhaustion, wear and tear, and since the loss, if any, was not sustained during the fiscal year in question.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals in reversing the judgment of the District Court, and in allowing the respondent to take deductions from its gross income, has laid down a rule which is in conflict with the rule established by the Circuit Court of Ap-

peals for the Third Circuit in *Renziehausen* v. *Commissioner,* decided March 7, 1929, not yet reported (see Appendix); the Eighth Circuit in *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626 (certiorari denied 273 U. S. 763); and the Ninth Circuit in *Landsberger* v. *McLaughlin,* 26 F. (2d) 77.

The rule laid down in the instant case is erroneous because it extends the statutory allowance for the obsolescence of property to good will—that is, to property which in its nature is not depreciated by exhaustion, wear and tear, and which, therefore, is not included within the statutory provisions relating to the deduction of a reasonable amount for obsolescence.

The question involved is one of general importance. The same principle is involved in a number of cases now pending before the courts and the Board of Tax Appeals, and in a large number of cases before the Treasury Department. For the guidance of the Treasury Department in its administration of the tax laws, and for the information of taxpayers generally, the question should be authoritatively determined by this Court.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM D. MITCHELL,
Attorney General.

APRIL, 1929.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The referee's opinion is found on page 408 of the record. This opinion has not been officially reported. The opinion of the District Court is reported in 20 F. (2d) 540, and is found in the record at page 427. The opinion of the Circuit Court of Appeals is reported in 30 F. (2d) 219, and is found in the record at page 568.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 21, 1929. (R. 573.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does Section 234 (a) (7) of the Revenue Act of 1918 permit a taxpayer to deduct from his gross income any portion of the March 1, 1913, value of the good will of the business in a year prior to the time that the value of that good will is destroyed by Federal legislation which proscribed the kind of business in which the taxpayer was engaged?

STATUTE INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, provides in part as follows:

> SEC. 234. (a) That in computing the net income of a corporation subject to the tax

imposed by section 230 there shall be allowed as deductions:

* * * * *

(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence * * *

STATEMENT

A statement of the facts and of the errors relied upon will be found in the petition.

ARGUMENT

The decision of the Circuit Court of Appeals in the instance case is directly in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit in *Renziehausen* v. *Commissioner,* decided March 7, 1929, not yet reported (see Appendix); the Eighth Circuit in *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626 (certiorari denied, 273 U. S. 763); and the Ninth Circuit in *Landsberger* v. *McLaughlin,* 26 F. (2d) 77.

The Government contends that the correct principle for the solution of the question in the instant case is to be found in the *Red Wing case, supra.* The reasoning of the Circuit Court of Appeals in that case that the obsolescence dealt with in Section 234 (a) (7) is only obsolescence of tangible property used in the business is convincing.

It may be added that the word "obsolete" is commonly used to describe something that is out of date or supplanted by improvements, and that the

word "obsolescence" does not aptly describe what happened to the good will in this case.

The Circuit Court of Appeals in the instant case admits that the *Red Wing* and the *Landsberger cases, supra,* are authorities against the view taken by it but says (R. 572)—

> Much as we respect the considered decisions of other circuits, we conceive that our duty requires us to form an independent judgment in cases of first impression in our own court * * *. Particularly in cases of a character such as this, diversity of view between the circuits is not a serious objection, for the Supreme Court will then exercise its appropriate function of taking up the question and determining the proper interpretation of an important section of the tax law. * * *

Consequently, they disagreed with the decisions of the Eighth and Ninth Circuits in the *Red Wing* and *Landsberger cases, supra.* The decision of the Third Circuit in the *Renziehausen case, supra,* which took the same view of the question as the *Red Wing case, supra,* was not handed down until subsequent to the decision of the Circuit Court of Appeals in the instant case.

The decision of the court in the instant case is also in conflict with the uniform holdings of the Board of Tax Appeals. *Joseph Garneau Co., Inc.,* 8 B. T. A. 1041; *Fred Eberlin Co.,* 8 B. T. A. 1107; *Frederick C. Renziehausen* v. *Commissioner,* 8

B. T. A. 87; *Manhattan Brewing Co.*, 6 B. T. A. 952.

CONCLUSION

Because of the far-reaching effect of the opinion below, because of its conflict with the decided cases in other circuits, and because of the manifest importance of an authoritative rule for the guidance of the Treasury Department, it is respectfully submitted that petition for certiorari should be granted.

WILLIAM D. MITCHELL,
Attorney General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
ALFRED A. WHEAT,
HARVEY R. GAMBLE,
Special Assistants to the Attorney General.

APRIL, 1929.

APPENDIX

In the United States Circuit Court of Appeals for the Third Circuit. Nos. 3940 and 3941. October Term, 1928

FREDERICK C. RENZIEHAUSEN, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER, *v.* FREDERICK C. RENZIEHAUSEN, RESPONDENT

PETITIONS FOR REVIEW FROM THE UNITED STATES BOARD OF TAX APPEALS

(Filed March 7, 1929)

Before Buffington, Woolley, and Davis, *Circuit Judges.*

DAVIS, *Circuit Judge:*

These cases are brought here on appeal and cross appeal on petitions to review a decision of the United States Board of Tax Appeals adjudging deficiencies in the petitioner's income taxes for the years from 1918 to 1922, inclusive, except 1921, for which year there was an overassessment. The deficiency for the year 1918 was $174,159.60; for 1919, $22,495.44; for 1920, $156,362.99; and for 1922, $67,745.39. The overassessment for 1921 was $23,924.57.

Mr. Renziehausen is a resident of Pittsburgh, and during the years in question he was the sole owner of the Large Distilling Company and a half-owner of Schuetz, Renziehausen & Company.

The business of these companies was principally that of distilling whiskey which they sold to wholesale dealers under uniform contracts. They also carried on a warehousing business. After the whiskey was distilled under these contracts it was stored in bonded warehouses and there remained until withdrawn by the owners, who held warehouse receipts for it and paid monthly storage charges therefor.

The assets of these two companies consisted of both tangible and intangible property, and the taxpayer contends that he is entitled to a deduction for the obsolescence of this property for the years in question.

The intangible property for which a deduction is claimed are trade-marks, trade brands, trade names, and good will.

Sections 214 of the Acts of 1918 (40 Stat. Part I, p. 1067) and 1921 (42 Stat. Part I, p. 240) provide: "That in computing net income there shall be allowed as deductions. * * * (8) A reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

The first question is whether or not a deduction in income may be allowed for the obsolescence of the trade-marks, trade brands, trade names, and good will.

There is no dispute as to the value of the intangible property of these companies, and the amount

of the deduction, if any, to which they are entitled is not in dispute.

Trade-marks, trade brands, and trade names are closely related to good will, and no attempt has been made to segregate or differentiate them. The Circuit Court of Appeals for the Eighth Circuit in an exhaustive opinion by Judge Kenyon in the case of *Red Wing Malting Company* v. *Willcuts,* 15 Fed. (2d) 626, held that a deduction for the obsolescence of the good will of a brewing company was not allowable on account of the passage of the National Prohibition Act because the allowance for obsolescence is limited to such property as is susceptible to exhaustion, wear, and tear by use in the business, and good will is not such property.

The clause, "including a reasonable allowance for obsolescence," enlarges the allowance made for exhaustion, wear and tear of property used in the business. The first allowance is made for depreciation resulting from exhaustion, wear and tear, or the *use* of the property in the business. The second allowance is made for depreciation resulting from obsolescence, or the *disuse* of the property in the business. The cause of depreciation in the one case is from use and in the other from disuse. They are antithetical. The property, however, is the same in both cases and must be such as may be, or has been, subject to exhaustion, wear and tear, and obsolescence. Is good will such property as the Congress had in mind? Does it have the attributes implicit in the language used?

Prior to the Red Wing case the Commissioner had decided both ways as to good will: that there

could be an allowance for its depreciation and that there could not be. Since that case, he has uniformly disallowed it. Consequently, his action is not persuasive either way.

The able dissenting opinions of Mr. Trammel in the *Manhattan Brewing Company case,* 6 B. T. A. 952 and of Judge Swan in the case of the *Haberle Crystal Springs Brewing Company* v. *Jesse W. Clarke, Collector of Internal Revenue for the Twenty-first District of New York,* — Fed. (2d) —, are persuasive. However, we are not convinced of the unsoundness of Judge Kenyon's reasoning in the Red Wing case, and so hold that obsolescence in this subsection is limited to property which is subject to depreciation by exhaustion, wear and tear, and that good will does not have such attributes and is not such property.

The taxpayer claims deductions from income for the years from 1918 to 1921, inclusive, for obsolescence of the tangible property of the Large Distilling Company. While he may have thought that the distilling business was at an end in 1918, the fact is that this property—plant, machinery, warehouses, and formulae—was used in distilling medicinal whiskey from 1918 to 1921, just as it was before that time. This use continued until the passage of the Willis-Campbell Act on November 23, 1921, and during that period, from 1918 to the passage of this Act, in which the taxpayer manufactured 16,654 barrels of whiskey, it can not be said that this physical property was obsolete.

For many years, since 1908, the taxpayer stored whiskey which he had manufactured but did not sell. This whiskey aged and became more valu-

able. He sold it all in 1922. He contends that he is entitled to have the profit made on such "old Whiskey" taxed as a capital gain at the rate of 12½ per cent instead of at the usual normal and surtax rates under the provisions of section 206 (a)(6) of the Act which provides:

> The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business), but does not include property held for the personal use or consumption of the taxpayer or his family, or stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year.

It seems to us this "old whiskey" was clearly a part of the stock in trade and would or should have been properly included in his inventory at the close of any taxable year just as any other whiskey on hand should have been.

The Board held that the Large Distilling Company became obsolescent in 1921. The Willis-Campbell Act was approved and became effective on November 23 of that year. Thereafter the Commissioner refused to issue a permit to the Company to distill medicinal whiskey and still refuses. He says that the plant, tangible property other than the bonded warehouses, did not become obsolete in 1921 or it would not have done so if a permit had been issued to the Companies to distil medicinal

whiskey. As a matter of fact, however, no permit has been issued. But he says that since it is possible that a permit may be issued at some future date, the plant did not become and is not obsolete. The difficulty with this argument is that it is an assumption contrary to fact. It is entirely hypothetical. The fact is the plant became entirely obsolete on November 23, 1921, and the allowance made by the Board for depreciation on account of obsolescence, which as to amount is not disputed, was justified by the facts in the case.

The Board found that because of the type of construction of the four warehouses of the taxpayer they can not be adapted or converted to any other purpose than the storage of whiskey in bulk. They have a total capacity of 55,000 barrels, which did not exceed the normal needs of the business. Because of restrictions imposed by the "Food Control" Acts upon the use and transportation of cereals and grains for beverage purposes, no whiskey was manufactured in 1917 from May until December 31. On January 1, 1918, there were stored in the warehouses 35,365 barrels of whiskey. The Board found that the total capacity of the houses was needed in the petitioner's business. The Board further found that:

> The deduction for obsolescence, we believe, like those for depreciation and depletion, should be based upon actualities, as nearly as that may be possible; and this is necessary if the deduction is to be a "reasonable" one as the statute contemplates. To require that the entire obsolescence should be spread and deducted from income as the remaining

> 27,393 barrels of whiskey, at the close of 1921, are withdrawn, would result in postponing the entire obsolescence deduction to years subsequent to 1921, when as a matter of fact obsolescence was sustained in that year to the extent of the reduction in the useful and valuable capacity of the warehouses. In view of the foregoing, it is our opinion that the petitioner is entitled to a deduction, for 1921, for obsolescence of the warehouses, in an amount representing the same proportion of the depreciated cost as the number of barrels representing the reduction in the useful and valuable capacity, plus the number of barrels withdrawn from November 24, to December 31, 1921, to wit: 27,607, bears to 55,000; and that for 1922 petitioner is entitled to a like deduction based upon the proportion which the number of barrels withdrawn during that year, to wit: 1,761, bears to 55,000, or in such manner that when the entire amount of whiskey has been withdrawn the entire cost of the buildings shall be returned by way of obsolescence and depreciation.

The respondent says that this conclusion is unsound for the reason that:

> If the Commissioner at the present time should issue a permit for the manufacture of medicinal whiskey, the taxpayer's warehouses could be used for the storage of that whiskey just as they were used in the taxable years. Certainly it can not be said that the

> taxpayer suffered a loss or obsolescence of warehouses which may subsequently be used as effectively as before the passage of the Willis-Campbell Act.

This contention is purely hypothetical, is based upon possibilities and assumptions, up to this time, contrary to fact and may never in the life of the taxpayer become a fact. It is really no answer to the Board's conclusion which is hereby affirmed on this point.

A decree may be entered in accordance with the above conclusions, and costs of the respective petitions for review shall be charged against the respective petitioners.

○

FILED
NOV 25 192
CHARLES ELMORE C
CLE

FILE COPY

No. 68

In the Supreme Court of the United States

OCTOBER TERM, 1929

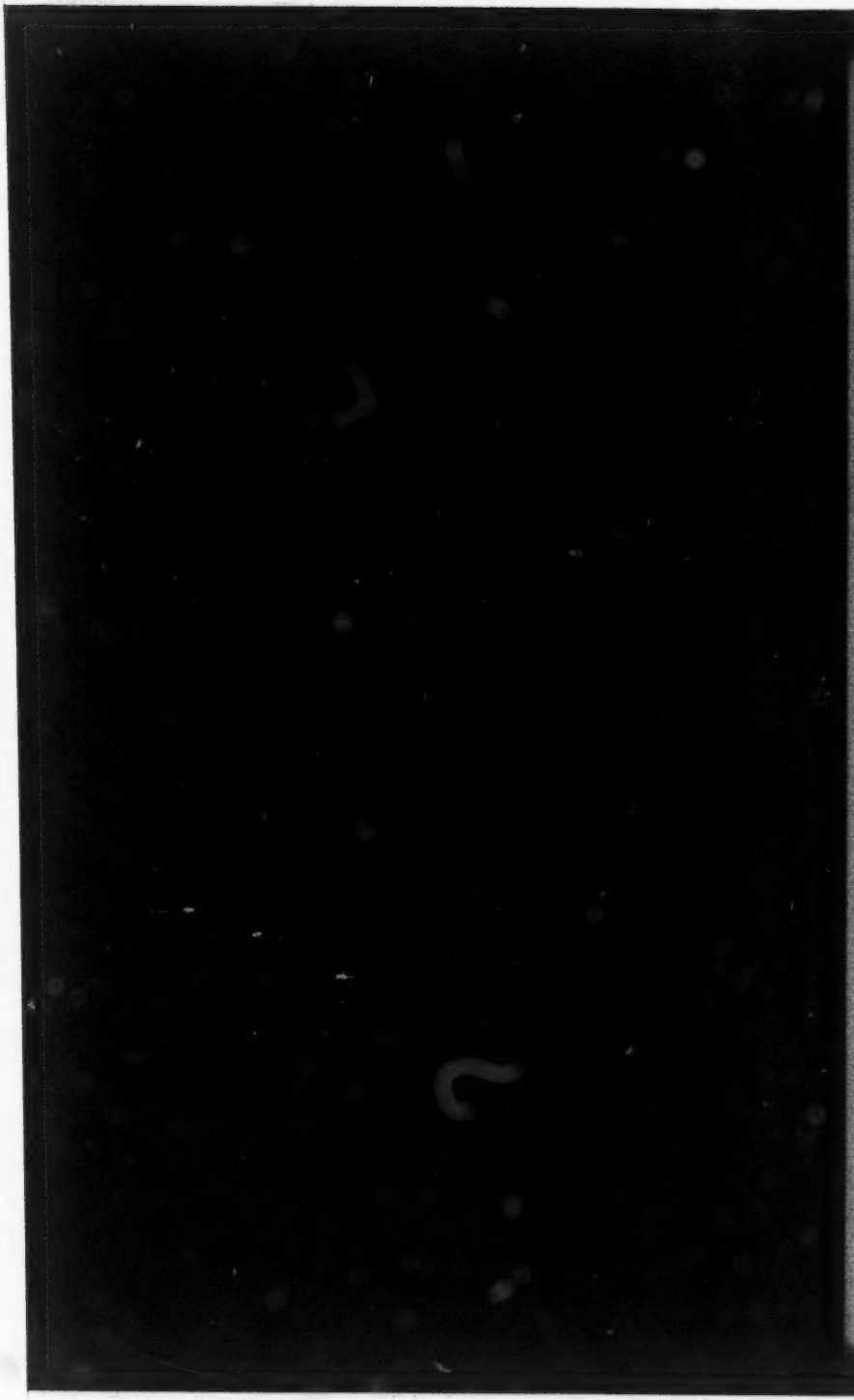
JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-FIRST DISTRICT OF NEW YORK, PETITIONER

v.

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER



INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Specification of error to be urged	5
Summary of argument	5
Argument:	
The statutory allowance for obsolescence in the revenue act of 1918 was intended to be applied only to property which is subject to exhaustion, wear and tear. Good will is not property of that character and hence no deduction for obsolescence is permitted	7
Conclusion	32

CITATIONS

Cases:	
American-La France Fire Engine Co. v. *Riordan*, 294 Fed. 567	30
Atlantic Carton Corp., Appeal of, 2 B. T. A. 380	22
Atterbury, Grosvenor, Appeal of, 1 B. T. A. 169	22
Brushaber v. *Union Pac. R. R.*, 240 U. S. 1	15
Eberlin, Fred, Co. v. *Commissioner*, 8 B. T. A. 1107	8
Garneau, Joseph, Co., Inc., v. *Commissioner*, 8 B. T. A. 1041	8
Hawaiian Sugar Co. v. *Commissioner*, 13 B. T. A. 683	22
Henrici, Philip, Co. v. *Reinecke*, 3 F. (2d) 34	22, 23
International Curtis Marine Turbine Co. v. *United States*, 63 C. Cls. 597	22
Kaufman-Straus Co. v. *Lucas*, 12 F. (2d) 774	22
Kentucky Tobacco Products Co. v. *Lucas*, 5 F. (2d) 723	15, 22, 23
Landsberger v. *McLaughlin*, 26 F. (2d) 77	7, 32
Lassen Lumber & Box Co. v. *Blair*, 27 F. (2d) 17	22, 27
Lynch v. *Alworth-Stephens Co.*, 267 U. S. 364	22, 23
Manhattan Brewing Co., Appeal of, 6 B. T. A. 952	8
Metropolitan Bank v. *St. Louis Dispatch Co.*, 149 U. S. 436	27
Montello Salt Co. v. *Utah*, 221 U. S. 452	21
Perfect Window Regulator Co. v. *United States*, 66 C. Cls. 147	22
Red Wing Malting Co. v. *Willcutts*, 15 F.(2d) 626; certiorari denied 273 U. S. 763	7, 8–14, 19, 32
Renziehausen v. *Commissioner*, 31 F. (2d) 675; No. 114, October Term, 1929	7

Cases—Continued.	Page
Secor Hotel Co., Appeal of, 7 B. T. A. 158	22
United States v. *Hermanos y Compania*, 209 U. S. 337	18
United States v. *Ludey*, 274 U. S. 295	25
Van Kannel Revolving Door Co. v. *Commissioner*, 11 B. T. A. 1209	22
Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503	15, 24
Weiss v. *Weiner*, 279 U. S. 333	15, 23
Statutes:	
Act of August 5, 1909, c. 6, 36 Stat. 11, 113	16
Act of October 3, 1913, c. 16, 38 Stat. 114, 172, par. G (b) (second)	16
Revenue act of 1916, c. 463, Sec. 12 (a) Second, 39 Stat. 756, 768	16
Revenue act of 1918, c. 18, 40 Stat. 1057, 1077, 1078:	
Sec. 214	22
Sec. 234	2
Miscellaneous:	
1 C. B. 133 (T. B. R. 44)	29
T. D. 1675, par. 73	16
T. D. 2929	29
T. D. 4055	30
Treasury Regulations 31, art. 4 (T. D. 1571)	17
Treasury Regulations 33:	
Art. 129	17
Art. 130	17
Art. 136	16
Treasury Regulations 33, revised:	
Art. 137	17
Art. 138	17
Art. 159	17
Art. 160	17
Art. 167	16
Art. 168	16
Art. 174	17
Art. 178	17
Treasury Regulations 45:	
Art. 161	25
Art. 163	29
Art. 166	29
Treasury Regulations 45, art. 166 (1920 Ed.)	29
Treasury Regulations 65, art. 166	27
Parsons on Partnership (4th ed.), sec. 181	27
Webster's New International Dictionary	20
New Standard Dictionary	20

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 68

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE for the Twenty-first District of New York, petitioner

v.

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The referee's opinion is found on page 224 of the Record. The opinion of the United States District Court for the Northern District of New York (R. 234) is reported in 20 F. (2d) 540. The opinion of the Circuit Court of Appeals (R. 303) is reported in 30 F. (2d) 219.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 21, 1929. (R. 309.) Peti-

tion for certiorari was filed April 19, 1929. Certiorari was granted May 13, 1929. (R. 310.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does Section 234 (a) (7) of the Revenue Act of 1918 permit a taxpayer to deduct from its gross income any portion of the March 1, 1913, value of the good will of the business prior to the time that the value of that good will was destroyed by Federal legislation which proscribed the kind of business in which the taxpayer was engaged?

STATUTE INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, 1078, are as follows:

> SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * * *
>
> (7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;
>
> * * * * *

STATEMENT

The Haberle Crystal Springs Brewing Company, the taxpayer and respondent herein, was a New York corporation organized in 1892. It was en-

gaged in the manufacture of lager beer and ale from the date of its incorporation until October 29, 1919, when it was compelled to cease such business by reason of Federal prohibition legislation, which was temporary in character. At all times material to the determination of this case it kept its accounts and records on the basis of a fiscal year ending May 31st. (R. 202.)

The National Prohibition Amendment was ratified by the requisite number of States on January 16, 1919 (R. 213), and became effective on January 16, 1920 (R. 206). By January 31, 1918, it became reasonably apparent that national prohibition would be adopted. (R. 206.) After national prohibition became effective by Federal legislation, the respondent had no good will and the value of its good will was wholly destroyed by prohibition legislation. (R. 207.) After October, 1919, the respondent confined its brewing activities to one of its two plants, where it continued in the business of manufacturing and selling soft drinks and cereal beverages until its liquidation on December 23, 1920. During this period its operations were conducted at a loss. (R. 207.) It sold such products during this period under the name of "Congress," which it had previously used as a trade name for its beer. The trade name applicable to its ale, to wit, "Derby Cream," was not used. (R. 209.)

The method of liquidation of the respondent consisted in a transfer of the greater part of its assets

to two newly formed corporations the stockholders of which, with the exception of one individual, were identical with the stockholders of the respondent. (R. 208.)

This action was instituted by the taxpayer in the United States District Court for the Northern District of New York and was referred to a referee (R. 22), who made findings of fact (R. 202) which were not changed by the District Court (R. 236). His conclusions of law (R. 213) in favor of the plaintiff were, however, not confirmed (R. 235). The court entered judgment for the defendant. (R. 219.) From this judgment appeal was taken to the United States Circuit Court of Appeals for the Second Circuit (R. 198), which reversed the judgment of the District Court (R. 309).

The respondent contends that under the provisions of Section 234 (a) (7) of the Revenue Act of 1918 it was entitled to deduct from the income of its fiscal year ending May 31, 1919, for obsolescence of its good will, which was wholly destroyed by the adoption of the Prohibition Amendment, 365/715 of the March 1, 1913, value thereof. The numerator of this fraction is the number of days in the fiscal year 1919; the denominator is the number of days from January 31, 1918, when it became reasonably apparent that national prohibition would be adopted, to January 16, 1920, when the Prohibition Amendment became effective. The petitioner contends that the statute does not authorize such a deduction.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the respondent was entitled under Section 234 (a) (7) of the Revenue Act of 1918 to a deduction from its gross income for the fiscal year ending May 31, 1919, on account of the exhaustion, wear and tear, or obsolescense of its good will, since the statute only intended to embrace property of such a nature that it was decreased, consumed, or disposed of by use in the trade or business, and good will is not such property.

SUMMARY OF ARGUMENT

In enacting the various excise or revenue Acts from 1909 until the Revenue Act of 1918, Congress provided for deductions from income for depreciation only in respect to those assets which were consumed or used up in the taxpayer's trade or business. The regulations and rulings of the Bureau of Internal Revenue construed these Acts in accordance with the legislative intent as above stated. An apparent exception was made as to patents and copyrights which may be explained on the theory they are prepaid business expenses. While an allowance had been permitted by the Treasury under the loss section of the statute for obsolescence of property in the year in which it became obsolete, such a deduction is clearly distinguishable from an allowance for true "obsolescence."

In enacting the Revenue Act of 1918, Congress did not intend to change the nature of the deprecia-

tion deduction, but meant to confine it to wasting assets. The change in wording of this Act was made for the purpose of allowing a supplemental deduction for obsolescence of wasting assets in those cases where the normal allowance for exhaustion, wear and tear would be insufficient to return the cost of such assets for the period of their useful life. By including a reasonable allowance for obsolescence in that for exhaustion, wear and tear Congress did not intend to provide a new and independent deduction nor to add any new species of property to that previously subject to the depreciation allowances. The word "including" only enlarges the previous allowances by introducing the specific element constituting the enlargement, namely, obsolescence. This appears from a consideration of the grammatical construction of the language and the meaning of the terms used. Such regulations and decisions as proceed upon the theory that intangible property suffers an actual loss of value by reason of the efflux of time serve to throw no light on the legislative intent in respect to the 1918 Act, since they were rendered after its enactment. Except in so far as they allow deduction for depreciation of an interest in wasting assets, they are incorrect in principle.

Good will exists only as an incident to a going business and is not an asset which can be exhausted or consumed by use. The fact that in a particular case its life may be limited because the duration of

the business of which it is a part is limited does not make it property subject to the allowance provided in Section 234 (a) (7). Even assuming that good will is property used in a trade or business within the meaning of the term, it was not the legislative intent to allow any recoupment of its March 1, 1913, value by a deduction for exhaustion, wear and tear, or obsolescence.

ARGUMENT

THE STATUTORY ALLOWANCE FOR OBSOLESCENCE IN THE REVENUE ACT OF 1918 WAS INTENDED TO BE APPLIED ONLY TO PROPERTY WHICH IS SUBJECT TO EXHAUSTION, WEAR AND TEAR. GOOD WILL IS NOT PROPERTY OF THAT CHARACTER AND HENCE NO DEDUCTION FOR OBSOLESCENCE IS PERMITTED

On the question here involved there is a conflict of opinion. The Circuit Court of Appeals for the Second Circuit has held in the instant case that obsolescence of good will is within the scope of the allowance for obsolescence in the Revenue Act of 1918.

On the other hand, the Circuit Court of Appeals for the Eighth Circuit in *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626, certiorari denied 273 U. S. 763; the Circuit Court of Appeals for the Ninth Circuit in *Landsberger* v. *McLaughlin,* 26 F. (2d) 77; and the Circuit Court of Appeals for the Third Circuit in *Renziehausen* v. *Commissioner,* 31 F. (2d) 675, now pending in this Court on writ of certiorari, No. 114, October Term, 1929, have held that under the Revenue Act of 1918 no deduction is al-

lowed for the obsolescence of good will for the reason that the allowance for obsolescence in the statute is supplementary to the allowance for exhaustion, wear and tear, and is limited to property which is subject to depreciation by exhaustion, wear and tear, and therefore excludes such intangible property as good will.

The same view of obsolescence was adopted by the Board of Tax Appeals. *Joseph Garneau Co., Inc.*, v. *Commissioner*, 8 B. T. A. 1041; *Fred Eberlin Co.* v. *Commissioner*, 8 B. T. A. 1107; *Appeal of Manhattan Brewing Co.*, 6 B. T. A. 952.

We contend that the decision of the court below is erroneous and that the *Red Wing* and other cases cited above represent the better view. The Circuit Court of Appeals for the Third Circuit in the *Renziehausen case* had the benefit of the contrary opinion of the court below herein but declined to adopt it, holding that the statutory deduction did not apply to property of the character of good will.

The views of the Government can not be better expressed than in the following language from the exhaustive opinion of the Circuit Court of Appeals for the Eighth Circuit in the *Red Wing case* (15 F. (2d) pp. 630–633):

> With these general propositions in mind, we proceed to a discussion of the statute in question. No difficulty arises as to the first part of subsection (7) of section 234 (a), "a reasonable allowance for the exhaustion, wear

and tear of property used in the trade or business." That is clear enough as defining the deduction. The controversy is over the part of the subsection following these words, viz, "including a reasonable allowance for obsolescence." Does this provide for a new, distinct deduction, or is it so attached and related to the previous phrase in subdivision (7) that it applies only to such property used in the business as is subject to exhaustion, wear, and tear?

* * * * *

If it had been intended by the Congress to create a new and additional deduction not connected with property used in the business subject to "exhaustion, wear and tear," it would have been very easy for Congress, instead of using the word "including," to have said, "a reasonable allowance for exhaustion, wear and tear and obsolescence of property used in the business." That would have made the matter clear.

The first part of the subsection provides for a deduction in arriving at tax income for the depreciation by exhaustion, wear, and tear of property used in the business. Depreciation was the matter sought to be remedied in order to restore to the owner the basis of original value. It is perfectly apparent that an allowance for depreciation due to exhaustion, wear, and tear of property might not sufficiently provide for the restoration of capital over the period of useful life of an asset, and it might be entirely inadequate to effect restoration of the March

1, 1913, value thereof. The meaning of the word "including," as used in the statute, is important. It evidently refers to the preceding part of the subsection, and must be recognized as occupying a significant and important place. It cannot be brushed aside and ignored. This court should not attempt to write new language into the statute, nor ignore language there used, but must endeavor, from the language of the statute itself, to arrive at the meaning of the Congress. This word has received considerable discussion in opinions of the courts. It has been productive of much controversy.

* * * * *

Perhaps the most lucid statement the books afford on the subject is in *Blanck et al.* v. *Pioneer Mining Co. et al.*, 93 Wash. 26, 30, 159 P. 1077, 1079, namely: "The word 'including' is a term of enlargement and not a term of limitation, and necessarily implies that something is intended to be embraced in the permitted deductions beyond the general language which precedes it. But, granting that the word 'including' is a term of enlargement, it is clear that it only performs that office by introducing the specific elements constituting the enlargement. It thus, and thus only, enlarges the otherwise more limited preceding general language. * * * The word 'including' introduces an enlarging definition of the preceding general words, 'actual cost of the labor,' thus of necessity excluding the idea of a further enlargement than that furnished by the enlarging clause

so introduced. When read in its immediate context, as on all authority it must be read, the word 'including' is obviously used in the sense of its synonyms 'comprising; comprehending; embracing.' "

It seems to us that the language "including a reasonable allowance for obsolescence" is but a part of and an enlargement of the previous phrase of the said subsection (7) relating to exhaustion, wear, and tear, and that the first part of the sentence was intended to cover the subject-matter thereof. It does not add a new kind of deduction, but merely permits the inclusion of an additional element, namely, obsolescence of such property used in the business as is subject to exhaustion, wear, and tear. The allowance for obsolescence was intended to be in connection with the allowance for exhaustion, wear, and tear; that being at times insufficient to restore the proper basis of capital values.

The history leading up to the enactment of subsection (7) of section 234 (a) of the 1918 act is important. The Excise Tax Act of 1909 (36 Stat. 112) § 38, permitted deduction of "a reasonable allowance for depreciation of property, if any." Regulations of the Treasury Department provided that the deduction should be the loss "that arises from exhaustion, wear and tear, or obsolescence out of the uses to which the property is put." The United States District Court for the Northern District of California, in *San Francisco & P. S. S. Co.* v. *Scott, Collector,* 253 F. 854, 855, discussed depreciation

as used in that statute, and said: "It is intended to cover the estimated lessening in value of the original property, if any, due to wear and tear, decay, or gradual decline from natural causes, inadequacy, obsolescence, etc., which at some time in the future will require the abandonment or replacement of the property, in spite of ordinary current repairs."

The Revenue Act of 1913 (38 Stat. 172) had this provision: "A reasonable allowance for depreciation by use, wear and tear of property, if any." The regulations under this act recognized the interpretation put upon the word "depreciation" under the previous act, and made an allowance for obsolescence "out of the uses to which the property is put."

The 1916 act (Comp. St. § 6336f) dropped the word "depreciation," and the deduction permitted was "a reasonable allowance for the exhaustion, wear and tear of property within the United States arising out of its use or employment in the business or trade." After that there was no basis for a deduction for obsolescence, as the depreciation deduction under the 1916 act excluded obsolescence.

When the Revenue Act of 1918 was before the Congress, the House wrote a provision the same as in the 1916 and 1917 acts, providing an allowance for "exhaustion, wear and tear" of property. The Senate adopted an amendment substituting the word "depreciation" for "exhaustion, wear and tear."

In conference, the word "depreciation" was stricken out, the words "exhaustion, wear and tear," restored, and the words "including a reasonable allowance for obsolescence" included. In this form the bill passed.

It would seem quite apparent, therefore, that Congress was not intending to add a new and independent deduction. It was merely trying to provide the restoration of capital value of a depreciable asset over the period of its useful life by allowing something, known as obsolescence, as an additional element to exhaustion, wear, and tear. This legislative history sustains, we think, the conclusion to which we are forced that the phrase "including a reasonable allowance for obsolescence" is one of specification and enlargement; that it is closely connected with and relates to the subject-matter of the other phrase of said subsection (7), and applies only to such property therein designated used in the business as is subject to exhaustion, wear, and tear.

That leads to the query, is good will such property? Good will is property of an intangible nature. It differs from such intangibles as patents, copyrights, licenses, and franchises, because, while in a certain sense it inheres in and is used in the business, it is not subject to depreciation, as that term is commonly understood and commonly used in the statutes. The Supreme Court of the United States in *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 446, 13 S. Ct. 944, 947 (37 L. Ed. 799) says:

"Undoubtedly, good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently. Mr. Justice Story defined good will to be 'the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices.' Story, Part. § 99."

* * * * *

We are satisfied there can be no wear or tear of good will, or exhaustion thereof by use, and, even should we assume that good will, separate and distinct from tangible property, is property used in the business, section 234 (a), subsection (7), of the 1918 Revenue Act limits the allowance for obsolescence to such property as is susceptible to exhaustion, wear, and tear by use in the business, and good will is not such property.

The question involved is solely one of statutory construction. In deciding such a question arguments addressed to the economic wrong involved

in the imposition of a tax are beyond judicial cognizance. *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1. This principle applies though the court may perceive hardship in taxing receipts as income without providing deductions on account of the exhaustion of the property. *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 525. Congress has adopted its own criteria that look to certain rather severe tests of liability and exemption. *Weiss* v. *Weiner*, 279 U. S. 333, 337.

Moreover, respondent is claiming a deduction. This is not a matter of inherent right, because, where the income does not result from a sale or conversion of capital assets, Congress has power to require the payment of taxes without allowing any deduction for the purpose of returning to a taxpayer his entire invested capital at the expiration of the life of the property from which the income was derived. *Kentucky Tobacco Products Co.* v. *Lucas*, 5 F. (2d) 723, 728. If respondent has any right to the deduction which is claimed in this case that right must be found in the words of the statute.

Congress made the first definite provision for obsolescence in the Revenue Act of 1918. Since the allowance for obsolescence is an outgrowth of allowances previously made, a consideration of the practice under the prior Acts should throw some light upon the question. An examination of the prior Acts indicates that it was the intention of Congress to allow only deductions for capital assets which

were consumed or wasted by use in the taxpayer's business.

The Act of August 5, 1909, c. 6, 36 Stat. 11, 113, permitted a deduction for "all losses actually sustained within the year * * * not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any," which this Court, applying the rule of strict construction, held in *Von Baumbach* v. *Sargent Land Co., supra,* did not include the depletion of mines.

Under the Act of 1909 the Treasury did not permit any deduction for depreciation of good will. Paragraph 73, T. D. 1675, promulgated February 14, 1911.

The Act of October 3, 1913, c. 16, 38 Stat. 114, 172, paragraph G (b) (second), permitted a deduction for "depreciation by use, wear and tear of property" and the Treasury Regulations promulgated thereunder ruled that depreciation was not allowed in connection with good will. Article 136, Regulations 33.

The Revenue Act of 1916, c. 463, 39 Stat. 756, 768, Section 12 (a) Second, provided for "a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade." The Treasury Regulations held that good will was an intangible asset of such nature that it was not subject to wear and tear and that no claim for depreciation in connection therewith would be allowed. Articles 167 and 168, Regulations 33, revised. Obsolescence of physical prop-

erty was recognized as a loss in the year in which the property became obsolete. Article 178, Regulations 33, revised. A deduction for the return of capital invested in patents was provided for, based upon actual cost. Article 174, Regulations 33, revised.

It thus appears that the statutes up to and including the Revenue Act of 1916 only permitted the deduction for depreciation or exhaustion, wear and tear in the case of those capital assets which were consumed or wasted in the production of income, and that they were so construed by the regulations. (Reg. 31, Art. 4, T. D. 1571; Reg. 33, Arts. 129, 130; Reg. 33, rev., Arts. 159, 160.) The appropriate method of measuring the deduction was taken to be an annual allowance based upon the estimated life of the asset in the business.

There is no inconsistency in the fact that the regulations permitted, under the head of depreciation, a return of the *cost* of patents by spreading it over the life of the patent. See Articles 137, 138, Regulations 33; Article 174, Regulations 33, revised. They may be explained on the theory that the amount invested in a patent was a prepaid cost of doing business and therefore should be spread over the term during which the property was used. The treatment was similar to that accorded to one who prepaid his insurance or his rent. It is obvious that such prepaid costs theoretically, at least, should not be charged against the income for the first year. But this is far different

from saying that the property itself is the subject matter of exhaustion, wear and tear. Even if it could be said that patents are of such a character that they are gradually exhausted during the limited life which they have, it is still true that they are unlike good will in that respect. Instead of being depreciated by use in the business, good will is of such a nature that in the ordinary business it grows through use and is actually enhanced in value. Accordingly, we submit that in any aspect there is sufficient distinction between patents and good will to justify different treatment.

At any rate, the Treasury consistently ruled that there was a difference between patents and good will and this is entitled to serious consideration in determining the legislative intent in the enactment of the Revenue Act of 1918. *United States* v. *Hermanos y Compañia,* 209 U. S. 337.

The Revenue Act of 1918 provided in Section 234 (a) (7) for the deduction of "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

Thus for the first time Congress provided a specific allowance for true obsolescence. While an allowance had been permitted by the Treasury under the loss section of the statute for "obsolescence" of property in the year in which it became obsolete, such a deduction is clearly distinguishable from an allowance for true "obsolescence."

Under this Act obsolescence becomes not a matter to be compensated for in the year in which the property becomes obsolete, as was the rule under the 1916 Act, but one to be added to the depreciation allowance. Since obsolescence never arises out of the use of property, the change in the phraseology of the 1916 Act was consistent with the introduction of obsolescence as a factor. But the controlling phrase "exhaustion, wear and tear of property" was not changed. The question then is whether this change of phraseology shows an intent on the part of Congress to add an entirely new species of property to that previously held to be the proper subject-matter of allowances under these sections.

It is submitted that the legislative history of Section 234 (a) (7) of the 1918 Act shows no such intent. This history is outlined in the opinion in *Red Wing Malting Co.* v. *Willcutts,* 15 F. (2d) at p. 632; *supra,* p. 12.

The structure of the statute itself indicates that Congress never intended the allowance to be applicable to intangible property, because the allowance was supplementary to that provided for in the prior Revenue Acts and was confined to property subject to exhaustion, wear and tear.

The words "exhaustion, wear and tear" in themselves connote only a physical consumption, lessening, or diminution of property. Clearly, this is so with respect to wear and tear. The word "exhaust" is defined in Webster's New International

Dictionary as "to draw forth; * * * to draw or let out wholly; * * * to empty by drawing or letting out the contents; * * * to use or expend wholly or till the supply comes to an end; to deprive wholly of strength; to use up * * *."

It is submitted that the allowance provided by the Act was intended to be in connection with the allowance for exhaustion, wear and tear, and that, by including obsolescence in the deduction, Congress enlarged it only to the extent of introducing the specific element constituting the enlargement, namely, obsolescence.

The word "include" is defined in the New Standard Dictionary as follows:

> (1) To comprise, comprehend, or to embrace as a component part, item, or member; as, this volume includes all his works; the bill includes his last purchase;
>
> (2) To enclose within; contain; confine; as, an oyster shell sometimes includes a pearl.

The arrangement of the sentence in Section 234 (a) (7) of the Act is significant. The phrase "including a reasonable allowance for obsolescence" immediately follows the provision for a "reasonable allowance for exhaustion, wear and tear of property used in the trade or business." The phrase is but a part of and an enlargement of the deduction for exhaustion, wear and tear, and the first part of the sentence was, we submit, intended to limit the subject-matter to which the phrase com-

mencing with the participle "including" should apply. The structure of the sentence indicates that it was not the intent to embrace any new kind of property but only to permit the inclusion of an additional element, to wit: "obsolescence," with respect to property to which the deduction for "exhaustion, wear and tear" would apply.

Upon a consideration of the definitions given in the dictionaries and decided cases, the Circuit Court of Appeals for the Eighth Circuit so held in the *Red Wing case* on page 631.

If Congress intended the allowance for obsolescence to apply to property not subject to exhaustion, wear and tear, it presumably would have used the following language: "a reasonable allowance for exhaustion, wear and tear, and obsolescence of property used in the trade or business." The word "and" would have had an "additive power" which the word "including" lacks. *Cf. Montello Salt Co.* v. *Utah,* 221 U. S. 452, 466.

In support of a contrary view the Circuit Court of Appeals pointed out that certain forms of intangible property such as patents and copyrights, licenses and franchises, are admittedly subjects of exhaustion or obsolescence allowances. It is our contention, as above stated, that the theory underlying these allowances was that such intangible assets had been acquired through a capital outlay, the cost of which should be returned by spreading it over the life of the asset. The cost of acquiring such assets

is a business expense which should have been permitted under Section 214 (a) (1) of the Revenue Act of 1918, rather than as depreciation and we submit that it was erroneous to treat the allowance as for the depreciation of the property itself.

The Circuit Court of Appeals cited cases showing that the statute permits the deduction of a reasonable allowance for the exhaustion of rights under patents, leases, and contracts of limited duration as follows: As to patents, *Van Kannel Revolving Door Co.* v. *Commissioner,* 11 B. T. A. 1209; *Perfect Window Regulator Co.* v. *United States,* 66 C. Cls. 147. As to leases, *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364; *Philip Henrici Co.* v. *Reinecke* (N. D. Ill.), 3 F. (2d) 34; *Kaufman-Straus Co.* v. *Lucas* (C. C. A., 6th), 12 F. (2d) 774; *Appeal of Grosvenor Atterbury,* 1 B. T. A. 169; *Appeal of Secor Hotel Co.,* 7 B. T. A. 158; *Hawaiian Sugar Co.* v. *Commissioner,* 13 B. T. A. 683. As to contracts, *International Curtis Marine Turbine Co.* v. *United States,* 63 C. Cls. 597; *Kentucky Tobacco Products Co.* v. *Lucas* (W. D. Ky.), 5 F. (2d) 723; *Lassen Lumber & Box Co.* v. *Blair* (C. C. A., 9th), 27 F. (2d) 17; *Appeal of Atlantic Carton Corp.,* 2 B. T. A. 380.

The Treasury, of course, followed its regulations in its litigation so that generally the cases cited do not decide that such an allowance is proper, but, that being conceded, decide the proper amount to be allowed. Accordingly, such cases do not establish any principle.

In *Lynch* v. *Alworth-Stephens Co., supra,* this Court permitted a lessee of mining property a deduction for the depletion of the mine in proportion to his interest in the physical property being exhausted. We submit that case did not decide, as the court below seemed to think, that the statute permitted an allowance for the exhaustion of an intangible. It was held that the leases created a very real and substantial interest in the ore and that the lessee's right to the deduction was limited to the amount of exhaustion caused by the depletion of the mine. *Cf. Weiss* v. *Weiner,* 279 U. S. 333, 336.

Some of the cases cited do decide that certain intangible property is subject to depreciation. Thus in *Philip Henrici Co.* v. *Reinecke, supra,* the District Court for the Northern District of Illinois held that a lease acquired prior to March 1, 1913, and having on that date a bonus value was depreciable property. Subsequently, the Circuit Court of Appeals for the Sixth Circuit made the same holding in the case of *Kaufman-Straus Co.* v. *Lucas, supra,* and the District Court for the Western District of Kentucky made a similar holding in respect to a contract in the case of *Kentucky Tobacco Products Co.* v. *Lucas, supra.* In a case involving a lease the Board of Tax Appeals held that the allowance for exhaustion was applicable. *Appeal of Grosvenor Atterbury, supra.* These cases can only be explained on the theory that intangible property loses value by reason of the efflux of time. Assuming that in these cases there was any loss of value, it

was in no way related to the use of the property and we therefore submit that the decisions in those cases were erroneous. In such cases the property is existent as completely on the last day as on the first. It has not been worn or torn. It has not been exhausted, for nothing has been drawn from it. There is in fact no exhaustion, wear or tear, no loss of content. One who has a limited right similar to a contract or leasehold does not suffer a loss of such property by receiving all that to which it entitled him. Such a right is clearly not exhausted by the use to which it is applied.

These cases in so far as they recognize depreciation of intangibles, seem to overlook the clear meaning of the language used by Congress. The words exhaustion, wear and tear connote a subject-matter from which something can be taken. One exhausts a mine by removing the ore from it, but does not thereby exhaust the ownership. Ordinarily intangible property by its nature has no content which can be exhausted. A right is enforced or realized, not exhausted.

We submit that just as a deduction for depletion of mines was denied in *Von Baumbach* v. *Sargent Land Co., supra,* because it was held that the allowance for "depreciation" in the 1909 Act was not intended to include depletion, so a deduction for obsolescence of good will should not be permitted here because not within the legislative intent.

Depreciation is a cost of operation. Since a portion of the service life of equipment goes into each unit produced, depreciation constitutes a charge upon the business as much as the raw material out of which its finished product is made and the labor that fashions and forms it.

A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, as contemplated by the statute, regardless of whether it is referred to as depreciation or as something else, is that amount which should be set aside for the taxable year in accordance with a consistent plan by which the aggregate of such amounts for the useful life of the property in the business will suffice with the salvage value at the end of such useful life to provide in place of the property itself its cost or its value as of March 1, 1913. Article 161, Regulations 45. *United States* v. *Ludey*, 274 U. S. 295.

It thus being the purpose of the statute to allow a restoration of capital over the period of its useful life, it is apparent that in certain cases the allowance for depreciation would be inadequate to effect such restoration of the cost or the March 1, 1913, value of an asset. The useful life of an asset may be cut short by the development of the industry whereby production becomes more economical through the employment of new inventions or replacement is required to satisfy new ideas or changing fancies of the consumer. The progress of the art and the demand of the public for better service

have resulted in the displacement of old and antiquated equipment before it is worn out. No industry has escaped the seemingly inevitable trend toward the adoption of more modern and economical equipment which requires the scrapping of the old equipment, because, although still in good physical condition, it is inadequate. Obsolescence is the term used to describe this process of gradual falling into disuse. It is obvious that an annual allowance for exhaustion, wear and tear would be wholly inadequate to restore to the owner of such an obsolete asset its original cost. To meet this situation Congress supplemented the allowance for "exhaustion, wear and tear of property used in the trade or business" by "including a reasonable allowance for obsolescence."

While obsolescence can certainly be anticipated, its precise measurement is involved in some difficulty. However, it is often possible for qualified experts to foretell with reasonable certainty which units of equipment may be able to serve their entire physical life and what classes are so uneconomical or otherwise defective that some improvement may be expected. Obsolescence presupposes that at a reasonably definite future date, which can be foreseen with reasonable certainty, a particular asset will finally arrive at a state of becoming useless, such uselessness not being due to exhaustion, wear or tear through use, but to the fact that economic developments render it imperative that it be dis-

carded. (See the discussion of obsolescence in *Lassen Lumber & Box Co.* v. *Blair* (C. C. A., 9th), 27 F. (2d) 17; see also Article 166 of Regulations 65, construing the identical provision of the Revenue Act of 1924.)

Ordinarily such a theory has no application to good will. The respondent's good will was not an interest which became exhausted by use. The interest is unique; it exists only as an incident to a going concern or business having locality or name and is not susceptible of being disposed of independently. *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 446. A fitting description of it is found in Parsons on Partnership (4th ed.), Section 181, where it is said that—

> the only proper signification of the word must be, that benefit or advantage which rests only on the *good-will*, or kind and friendly feeling of others * * *. * * * It is a hope or expectation, which may be reasonable and strong, and may rest upon a state of things that has grown up through a long period, and been prompted by large expenditures of money. And it may be worth all the money it has cost, and a great deal more; but it is, after all, nothing more than a hope, grounded upon a probability.

Good will is not affected by the multitude of factors which contribute to the obsolescence of physical assets. It has no approximate period of useful life, and the exercise of the police power is probably the

sole instance where a reasonably definite future date can be foreseen when good will will be without value. Since good will is based and must be valued on the ability to make above normal profits, its value rises and falls with the profits of the business, and it is unreasonable to suppose that Congress in providing a rule of general application intended that the decrease in value of a changing thing like good will should operate to reduce gross income. Good will does not ordinarily depreciate, but only fluctuates in value, and it is not practicable to take these changing values into account for tax purposes.

We think it is clear that the word "obsolescence" does not aptly describe what happened to the good will in this case. It should be noted that reduction in value of its good will as a realized loss in the price obtained from the sale of petitioner's plant is not the matter here involved. Such a loss is provided for under Section 202 in the year in which it actually occurs. The deduction here is claimed on account of alleged obsolescence of property while ownership was retained by the taxpayer.

In view of the foregoing, we think it is evident that good will is of such a character that Congress in dealing with deductions for obsolescence and providing a rule of general application never contemplated that good will was susceptible of that sort of depreciation.

The Treasury Regulations issued under the 1918 Act construed the new allowance for obsoles-

cence as applying only to the same species of property to which the old allowance for depreciation applied and accordingly held that the allowance did not apply to good will. (Art. 163, Regulations 45.) The statutory provision was put into effect by permitting a revised estimate of the useful life of assets so as to allow for such future obsolescence as could be expected from experience to result from the normal progress of the art. (Art. 166, Regulations 45 (1920 ed.).)

The Revenue Acts subsequent to the Act of 1918 have continued the deduction for obsolescence without change in the language.

After the publication of the original regulations under the 1918 Act, in which good will was specifically excluded from the obsolescence allowance, there occurred a change in the attitude of the Treasury Department. Following a decision of the Advisory Tax Board, known as T. B. R. 44, published in 1 C. B. 133, holding that intangibles such as good will, trade-marks, or trade brands were the subject of an obsolescence allowance, the regulations were amended by deleting the language which specifically excluded such an allowance. (T. D. 2929.) Thereafter the Treasury Department recognized deductions for obsolescence of good will under various limitations and restrictions. (O. D. 472, 2 C. B., January–June, 1920, p. 141.) For example, good will was not recognized as separable from a going concern, and hence the deduction was not permitted in those cases where the taxpayer would

be able to continue in any similar business. (O. D. 472, *supra.*) It should be noted that the respondent continued in the similar business of manufacture and sale of soft drinks and cereal beverages after October, 1919, and sold such products under the name previously used as a trade name for its beer. (R. 209.) The amended regulations remained in effect for a period of nearly eight years and were again modified by T. D. 4055, restoring the provision that no deduction for depreciation, including obsolescence, is allowable in respect of good will. This has since been the rule and there have been no more deductions for obsolescence of good will.

The ruling permitting the deduction for obsolescence of good will occurred after the enactment of the Revenue Act of 1918 and throws no light upon the legislative intent in respect to that Act. It was a departure from an otherwise consistent interpretation of the statute which excluded an allowance for obsolescence of good will and it is submitted that this departure was due to an erroneous interpretation of the statute and is incorrect in principle. Such an erroneous interpretation of the statute by the Treasury does not preclude the Government from imposing and collecting the tax on subsequent restoration of the earlier rule. *American-La France Fire Engine Co.* v. *Riordan,* 294 Fed. 567, 572.

Nor should the fact that in this particular case the record shows that on January 31, 1918, it was reasonably apparent that prohibition legislation

would be adopted, alter the construction of a rule of general application. The Revenue Act of 1918 was not enacted until February 24, 1919, and presumably the effect of prohibition legislation was foreseen by Congress. If Congress had then intended to apply obsolescence to property of a different character from that to which the Treasury had theretofore applied the allowance for exhaustion, wear and tear, we believe that Congress would have expressed its intention in a more definite manner. What it did was to "include" in that allowance a reasonable allowance for obsolescence.

It is quite probable that the outlook in 1918 affected the value of the respondent's good will. But such a change in value does not, we submit, come within the statutory phrase. During the taxable year it was not being used up or consumed by the sales which it produced and was not an exhausting or depreciating asset. The fact that the good will in this case might have a limited life does not in itself make it property which is a proper subject of the allowance. The limitation on the life of property is not the cause of exhaustion, wear and tear. It is merely a convenient measure of the period over which the cost of wasting property should be spread in order that such cost may at all times exist either in the property itself or in the restored capital. Good will is not a separate asset used in the business, and in this respect it differs from tangible property and from contracts and leaseholds. It is nothing but a value attached to a going business.

It may well be doubted whether good will should be considered property "used in the trade or business." *Cf. Landsberger* v. *McLaughlin, supra,* p. 78, *Red Wing Malting Co.* v. *Willcuts, supra,* p. 633. But even if this should be conceded, it is submitted that it is not subject to "exhaustion, wear and tear," and was not intended to be within the allowance for "obsolescence."

CONCLUSION

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals is erroneous and should be reversed.

CHARLES E. HUGHES, Jr.,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
NORMAN D. KELLER,
Special Assistants to the Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
T. H. LEWIS, Jr.,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

NOVEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

Office Supreme Court, U
FILED
DEC 5 1929
CHARLES ELMORE CROP
CLERK

No. 68.

In the Supreme Court of the United States.

OCTOBER TERM, 1929.

JESSE W. CLARKE, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-FIRST DISTRICT OF NEW YORK,

Petitioner,

against

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE HABERLE CRYSTAL SPRINGS BREWING COMPANY, RESPONDENT.

ARTHUR A. BALLANTINE,
GEORGE E. CLEARY,
Attorneys for THE HABERLE CRYSTAL SPRINGS BREWING COMPANY,
Respondent.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

INDEX.

PAGE

Opinions below 2
Jurisdiction 2
Question presented 3
The Statute Involved 3
Statement of case 3
Preliminary statement as to rulings of Bureau of Internal Revenue and lower court decisions 5
Argument 10

Under Section 234(a)(7) of the Revenue Act of 1918 the taxpayer, a brewing company, was entitled to deduct a reasonable allowance for the exhaustion, including obsolescence, of its good will, from income of the year ending May 31, 1919, it having become certain prior to that period that the useful life of the good will would be terminated by January 16, 1920, because of prohibition legislation 10

I. The statute (Section 234(a)(7) Revenue Act of 1918) authorizing the allowance, uses the term "property" without restriction or limitation, and this term is not confined in its application to property of such a nature that it was decreased, consumed or disposed of by use in the trade or business, but applies to all property, tangible or intangible, used in the business, which was in fact subject to exhaustion, wear and tear, including obsolescence 11

(a) No restriction on the meaning of the word "property" or in the application of the obsolescence allowance to property generally, is expressed in the language of the statute 12

(b) The allowance for obsolescence is as necessary for the computation of income in the case of intangible property as in the case of tangible property and therefore falls equally within the "intent" of the unrestricted language of the statute which admittedly provides such an allowance in the case of tangible property 14

(c) The including of the obsolescence allowance in or with the "exhaustion, wear and tear" allowance has no tendency to show that the allowance is restricted to the obsolescence of tangible property. Exhaustion itself applies to intangible property as well as to tangible property, and the history of the statute indicates no limitation in its application 19

PAGE

(1) The term "exhaustion" in or with which the obsolescence allowance is included, is not confined to physical consumption, lessening or diminution of tangible property, but includes the exhaustion of the value or usefulness of intangible property having a limited useful life through lapse of time..... 20

(2) The Revenue Act of 1918 does not require that exhaustion of property result from use of the property in the business..... 28

(3) The legislative history not only does not support the petitioner's contention that exhaustion applies only to tangible property, but indicates that no such restriction was intended..... 28

(d) Limiting the application of Section 234(a)(7) to tangible property is contrary to uniform rulings of the Treasury Department in force for over ten years and still in effect which have been approved by the Board of Tax Appeals and the Courts and by Congress through reenactment of the governing provision..... 31

II. The reasonable allowance for obsolescence, authorized by Section 234(a)(7) of the Revenue Act of 1918, applied to the good will property of a brewing company, when the future destruction of that good will through the adoption of the prohibition amendment became a certainty 33

(a) Good will is property used in such business.... 33

(b) The good will property of brewing companies was rendered obsolescent in fact when the adoption of prohibition at an ascertainable future date became a certainty 34

III. There is nothing in the Red Wing Malting opinion or elsewhere which establishes any basis for denying, in the case of good will having a limited useful life, the reasonable allowance for exhaustion, including obsolescence, permitted with respect to other kinds of property..... 40

IV. The decision of the Circuit Court of Appeals should be affirmed..... 45

Appendix A—Rulings and decisions holding that deductions for exhaustion, wear and tear, including obsolescence, are allowable with respect to intangible, as well as tangible, property..... 46

CITATIONS.

Cases:

	PAGE
Atlantic Carton Corp., Appeal of, 2 B. T. A. 380	49
Atterbury, Grosvenor, Appeal of, 1 B. T. A. 169	23, 26, 49
Autovent Fan & Blower Co., Appeal of, 5 B. T. A. 282	50
Ball and Roller Bearing Co., Appeal of, 15 B. T. A. 862	51
Blanck, *et al. v.* Pioneer Mining Co., *et al.*, 93 Wash. 26	41
Barnes, Charles G., *et al.*, Appeal of, 8 B. T. A. 360	50
Browning, J. M. & M. S., Appeal of, 6 B. T. A. 914	50
Christensen Machine Co., Appeal of, 17 B. T. A.——— (November 19, 1929)	51
Coca Cola Bottling Co. *v.* Coca Cola Co., 269 Fed. 796	33
De Ganey *v.* Lederer, 250 U. S. 376	12
Deltox Grass Rug Co., Appeal of, 7 B. T. A. 811	50
Edwards *v.* Darby, 12 Wheat. 206	32
Even Realty Co., Appeal of, 1 B. T. A. 355	16
Ewa Plantation Co., Appeal of, 13 B. T. A. 625	50
Farmers Feed Co., Appeal of, 17 B. T. A. 507	51
Gray, Jr., J. J., Appeal of, 2 B. T. A. 672	49
Hawaiian Sugar Co., Appeal of, 13 B. T. A. 683	50
Henrici Co. *v.* Reinicke, 3 F. (2d) 34	24, 34, 48
Hershey Mfg. Co., Appeal of, 14 B. T. A. 867	51
Hess Building Co., Appeal of, 15 B. T. A. 891	51
Hill, H. B., Appeal of, 3 B. T. A. 761	49
Hiller *v.* U. S., 106 Fed. 73	43
Hotel de France Co., Appeal of, 1 B. T. A. 28	49
Hotel Wisconsin Realty Co., Appeal of, 16 B. T. A. 334	51
Individual Towel and Cabinet Service Co., Appeal of, 5 B. T. A. 158	49
International Curtis Marine T. Co. *v.* U. S., 63 Ct. Cl. 597	48
Jacksonville Terminal Co. *v.* Blanshard, 77 Fla. 855; 82 So. 300	43

PAGE
Kaufman-Straus *v.* Lucas, 12 F. (2d) 774.....30, 34, 48
Kensington Water Co., Appeal of, 16 B. T. A. 630... 51
Kentucky Tobacco Products Co. *v.* Lucas, 5 F. (2d) 723 48
Landsberger *v.* McLaughlin (1928), 26 F. (2d) 77.. 8
Legett and Platt Spring Bed Co. *v.* Crooks, D. C. W. D. Mo. (1929)..... 48
Lynch *v.* Alworth-Stephens Co. 267 U. S. 364..12, 13, 24, 30, 48
Maguire Estate, John A., Appeal of, 17 B. T. A. 394 51
Manhattan Brewing Co., Appeal of, (1927) 6 B. T. A. 952 .....8, 9, 24, 36, 44, 51
Mead Cycle Co., Appeal of, 10 B. T. A. 887..... 50
Metropolitan Bank *v.* St. Louis Dispatch Co., 149 U. S. 436 33
Modern Inventions Co., Appeal of, 16 B. T. A. 1267.. 51
Montello Salt Co. *v.* Utah, 221 U. S. 452..... 43
National Lead Co. *v.* U. S., 252 U. S. 140..... 32
Nice Ball Bearing Co., Appeal of, 5 B. T. A. 484.... 50
Oahu Sugar Co., Appeal of, 13 B. T. A. 404.....26, 30, 50
Owens Bottle Co., Appeal of, 8 B. T. A. 1197..... 50
Perfect Window Regulator Co. *v.* U. S. ——— Ct. Cl. ——— (June 18, 1928)..... 48
Red Wing Malting Co. *v.* Willcuts (1925), 8 F. (2d) 180 8
Red Wing Malting Co. *v.* Willcuts (1926), 15 F. (2d) 626, certiorari denied, 273 U. S. 763.....8, 10, 40, 43
Renziehausen *v.* Commissioner (1929), 31 F. (2d) 675, C. C. A. 3rd, certiorari granted (now No. 114, October Term 1929)..... 9
Robertson *v.* Downing, 127 U. S. 607..... 32
St. Louis Screw Co., Appeal of, 2 B. T. A. 649..... 49
Secor Hotel Co., Appeal of, 7 B. T. A. 158..... 50
Service Recorder Co., Appeal of, 2 B. T. A. 96..... 49
Sullivan Machinery Co. *v.* U. S., 168 Fed. 561..... 43
Topeka Tent & Awning Co., The, Appeal of, 3 B. T. A. 521 49
Treat *v.* White, 181 U. S. 264..... 12

PAGE

Union Metal Mfg. Co., Appeal of, 1 B. T. A. 395.... 23, 49
United Profit Sharing Corp. *v.* U. S. ——— Ct. Cl. (June 18, 1928)..... 48
United States *v.* Carver, 260 U. S. 482..... 8
United States *v.* Falk, 204 U. S. 143..... 32
United States *v.* Healey, 160 U. S. 136..... 32
United States *v.* Ludey, 274 U. S. 295..... 16
United States *v.* Pierce, 147 Fed. 199..... 43
United States *v.* Union Pacific Railroad Co., 91 U. S. 72 12

Van Kannel Revolving Door Co., Appeal of, 11 B. T. A. 1209..... 50

Washburn *v.* National Wall Paper Co., 81 Fed. 17.. 33
Weiss *v.* Weiner, 279 U. S. 333..... 26
Western Wheeled Scraper Co., Appeal of, 14 B. T. A. 496 51

Statutes:

Corporation Excise Tax Law of Aug. 5, 1909,
Sec. 38..... 42
Income Tax Law of Oct. 3, 1913,
Sec. 2..... 42
Revenue Act of 1916
Sec. 5..... 43
Sec. 12.....13, 29, 42
Revenue Act of 1918
Sec. 234.....3, 10, 11, 12, 27, 28, 31, 33, 43
Sec. 325..... 13, 34
Revenue Act of 1921
Sec. 234..... 10
Revenue Act of 1924
Sec. 234..... 10
Revenue Act of 1926
Sec. 234..... 10
Revenue Act of 1928
Sec. 23..... 10

Regulations and Bureau Rulings:

PAGE

Reg. 33 ..... 21, 30, 46
Reg. 45 ..... 5, 6, 22, 31, 32, 43, 46
Reg. 62 ..... 5, 32, 46
Reg. 65 ..... 5, 32, 46
Reg. 69 ..... 5, 32, 46
Reg. 74 ..... 5, 32, 43, 46
A. R. M. 34 2 C. B. 31 6
T. B. R. 44 1 C. B. 133 ..... 4, 6, 7
T. D. 1675 30
T. D. 2929 Oct. 7, 1919 ..... 6, 7
T. D. 3414 I-2 C. B. 90 ..... 7, 47
T. D. 3760 IV-2 C. B. 154 ..... 7, 23, 26, 30, 32, 47
T. D. 4055 IV-2 C. B. 63 8

Senate and House Reports:

Conference Committee Print H. R. 12863, 65th Cong. 3rd Session, Sec. 234 (a)(7) 30

Encyclopedias and Dictionaries:

28 Corpus Juris 730 33
Century Dictionary and Encyclopedia 18
Murray's New English Dictionary 21
Webster's International Dictionary 21

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1929.

No. 68.

JESSE W. CLARKE, Collector of Internal Revenue for the Twenty-first District of New York,
Petitioner,

AGAINST

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE HABERLE CRYSTAL SPRINGS BREWING COMPANY, RESPONDENT.

This case comes before the Court on a writ of certiorari granted May 13, 1929 (R. 310), 279 U. S. 832, and involves a suit by respondent brought in the United States

District Court for the Northern District of New York, for the recovery of Federal income and profits taxes paid for the fiscal year ended May 31, 1919. The petitioner is sometimes referred to herein as the defendant and the respondent as the taxpayer.

Opinions Below.

Circuit Court of Appeals for the Second Circuit, Opinion, 30 F. (2d) 219 (R. 303);

District Court, Northern District of New York, Opinion, 20 F. (2d) 540 (R. 233);

Referee, Findings of Fact and Conclusions of Law (R. 202-213); Opinion (R. 224);

The referee found that the taxpayer was entitled to judgment for $16,618.08 with interest and costs (R. 213). The District Court dismissed the complaint (R. 219). The Circuit Court of Appeals reversed the judgment of the District Court and directed entry of judgment for the taxpayer on the referee's report (R. 309).

Jurisdiction.

The Court has jurisdiction under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, Section 1, 43 Stat. 938). The decree of the Circuit Court of Appeals was filed January 21, 1929 (R. 309). The petition for a writ of certiorari made by the defendant was based on the ground that decisions by other Circuit Courts of Appeals conflict with the decision in the instant case (see p. 8 below).

Question Presented.

Does Section 234(a) (7) of the Revenue Act of 1918 permit taxpayer, a brewing company, to deduct a reasonable allowance for the exhaustion, including obsolescence, of its good will, from gross income of the year ended May 31, 1919, it having become certain prior to that period that the useful life of the good will would be terminated by January 16, 1920 because of prohibition legislation?

The Statute Involved.

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, provides in part as follows:

> "Section 234(a). That in computing the net income of a corporation subject to the tax imposed by Section 230 there shall be allowed as deductions:
>
> * * * * * *
>
> (7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence; * * *."

Statement of Case.

The findings of fact made by the referee in the suit in the District Court appear at pages 202-213 of the record. No question is raised by the petitioner as to the facts.

Important facts not adequately covered by the petitioner's statement are as follows:

The actual value on March 1, 1913, of the taxpayer's good will was not less than $174,482.64 (R. 206). The

taxpayer earned substantial net income in every year from 1908 to 1919 (R. 205, 207). The taxpayer made no net profit but sustained net losses in each accounting period after October 28, 1919, the date upon which the manufacture and sale of beer and ale was prohibited by Federal prohibition legislation (R. 207).

After national prohibition became effective by Federal legislation the taxpayer had no good will, and the value of its good will was wholly destroyed by prohibition legislation (R. 207). Early in 1918 the officers of the taxpayer became satisfied that prohibition was imminent and took steps to reduce the taxpayer's assets to cash, and to prepare for the eventual total or partial liquidation of the company (R. 209). The taxpayer was compelled to cease the business of the manufacture, sale and marketing of beer and ale in October, 1919, by reason of Federal prohibition legislation, and went into voluntary liquidation on December 31, 1920 (R. 202).

The parties have agreed that if any deduction from taxpayer's income for the fiscal year ending May 31, 1919, for obsolescence of good will, is allowable under the statute, such deduction shall be 365/715ths of the value of such good will on March 1, 1913 (R. 206). The numerator of the fraction is the number of days in the fiscal year 1919; the denominator of the fraction is the number of days from January 31, 1918, when it became reasonably apparent that national prohibition would be adopted, to January 16, 1920, when the prohibition amendment became effective (R. 206). This period had been fixed by the Bureau of Internal Revenue in T. B. R. 44, 1 C. B. 133.

The taxpayer made no profit from the cereal beverage

and soft drink business conducted by it from October, 1919, to December, 1920 (R. 207). Very little of these products were sold, they had to be sold to a new trade, and in bottled form, which was expensive and unprofitable (R. 210). The taxpayer's good will was wholly destroyed by prohibition legislation (R. 207).

The entire amount of tax in controversy turns on the answer to the single question above stated and the question is wholly one of statutory construction.

Preliminary Statement as to Rulings of Bureau of Internal Revenue and Lower Court Decisions.

Since the enactment of the Revenue Act of 1918 (February 24, 1919), the Bureau of Internal Revenue has consistently held and now holds, that Section 234(a)(7) of that Act, and identical provisions of later acts, permit the deduction from income of a reasonable allowance for exhaustion, wear and tear, including obsolescence, of intangible assets the use of which in the trade or business is definitely limited in duration.

Article 163, Regulations 45 (1919)—Revenue Act of 1918.

Article 163, Regulations 62 (1922)—Revenue Act of 1921.

Article 163, Regulations 65 (1924)—Revenue Act of 1924.

Article 163, Regulations 69 (1926)—Revenue Act of 1926.

Article 203, Regulations 74 (1929)—Revenue Act of 1928.

The rulings of the Bureau never expressed any doubt as to this general position, although for a time the Bureau refused to permit the allowance to be applied in the case of leases, and since the court decision referred to below has denied its application to good will. (See Appendix A, p. 46 below.) Rulings indicating how the present controversy arose and its relation to the general position of the Bureau are briefly referred to below.

From 1919 until 1927 the Bureau of Internal Revenue held that distillers and brewers were entitled, under Section 234(a)(7) of the Revenue Act of 1918, to deduct a reasonable allowance for obsolescence of good will and similar assets from income of the years 1918, 1919 and 1920, in all cases where the useful life of such good will was, in fact, limited and the value thereof destroyed by prohibition legislation.

T. B. R. 44, 1 C. B. 133, August, 1919.
T. D. 2929, October 7, 1919.

The allowance was based on the value of the good will on March 1, 1913, if acquired prior thereto, and spread over the period January 31, 1918, to January 16, 1920.

T. B. R. 44, supra.
A. R. M. 34, 2 C. B. 31.

It is true that the original Regulations 45 (April, 1919), under the new provisions of the Revenue Act of 1918 (enacted February 24, 1919), which first provided for obsolescence deductions, made the following statement:

> "There can be no such allowance in respect of good will, trade names, trade marks, trade brands, secret formulae or processes" (Article 163).

As shown by T. B. R. 44, *supra,* when the Bureau's attention was directed to the fact that although good will and similar assets ordinarily had an unlimited life, in the unusual case of brewers and distillers affected by prohibitory legislation the good will and similar assets had a *limited useful life* in the business, the limiting sentence above quoted was dropped from the Regulations.

T. D. 2929, October 7, 1919.

This action was taken before any of the returns for the year 1918, filed in March and June, 1919, were finally audited. All 1918, 1919 and 1920 returns closed prior to 1927 were closed under regulations and rulings allowing a deduction for obsolescence of good will, where the taxpayer could satisfy the Bureau of Internal Revenue that such obsolescence had, in fact, occurred.

The general rule that allowances for exhaustion, wear and tear, including obsolescence, of intangible assets having a limited useful life were authorized by the statute, has never been attacked in the courts by the Government prior to the present case and is still in full effect in the regulations and practice of the Treasury Department. In the case of leases, the Department did making a ruling (T. D. 3414, I-2 C. B. 90, Nov. 25, 1922) that the allowance did not apply, but this ruling was revoked and exhaustion of leases allowed by T. D. 3760, IV-2 C. B. 154, Oct. 10, 1925.

The specific question as to obsolescence of good will got before the courts only in those cases where the Bureau of Internal Revenue denied that the obsolescence had, in fact, occurred. The question first arose in the courts as to a *malting* company. The malting business was not pro-

hibited, although most of the taxpayer's customers were put out of business. The District Court found that the taxpayer's good will was, in fact, destroyed as a result of prohibition, but held, contrary to rulings of the Bureau of Internal Revenue, that Section 234(a)(7) of the Revenue Act of 1918 did not authorize a deduction in any case for obsolescence of good will.

Red Wing Malting Company v. *Willcuts,* 8 F. (2d) 180 (1925).

The decision of the District Court was affirmed, *Red Wing Malting Company* v. *Willcuts,* 15 F. (2d) 626, 8th C. C. A. (1926), certiorari denied 273 U. S. 763. The denial by this court of certiorari did not, of course, constitute any expression of opinion on the merits.

United States v. *Carver,* 260 U. S. 482.

After this decision, the Commissioner of Internal Revenue amended the Regulations so as to deny a deduction for obsolescence of good will in all cases (*T. D. 4055,* August 4, 1927, IV-2 C. B. 63). The Commissioner made no change, however, in the Regulations in so far as they applied to other forms of intangible property and the Regulations so applying continued in full effect.

The Red Wing Malting Company decision was followed by other courts and by the Board of Tax Appeals largely on the basis of the reasoning of the court in that decision.

Appeal of Manhattan Brewing Company, 6 B. T. A. 952 (1927);

Landsberger v. *McLaughlin,* 26 F. (2d) 77, 9th C. C. A. (1928);

Renziehausen v. *Commissioner,* 31 F. (2d) 675, 3rd C. C. A. (1929), Certiorari granted (now No. 114, October Term, 1929).

The Circuit Court of Appeals below was of the opinion that the reasoning in the *Red Wing Malting Company* decision was unsound and refused to follow the decisions in the Eighth and Ninth Circuits and in the Board of Tax Appeals. A clear statement of the position here maintained by the taxpayer is contained in the dissenting opinion of Mr. Trammell in the *Manhattan Brewing* case, appearing at 6 B. T. A. 964.

The petitioner applied for certiorari in this case because of the conflict between the decisions in other circuits and the decision in this case by the Circuit Court of Appeals for the Second Circuit.

Summary of Taxpayer's Argument.

An outline of taxpayer's argument is set forth in the Index at the front of the Brief.

ARGUMENT.

Under Section 234(a)(7) of the Revenue Act of 1918 the taxpayer, a brewing company, was entitled to deduct a reasonable allowance for the exhaustion, including obsolescence, of its good will, from income of the year ending May 31, 1919, it having become certain prior to that period that the useful life of the good will would be terminated by January 16, 1920, because of prohibition legislation.

In petitioner's brief in this case, representatives of the Government attack the validity of the Treasury Regulations in effect since 1919, and in full force and effect today, holding that Section 234(a)(7) of the Revenue Act of 1918, and identical provisions of subsequent Revenue Acts, provide for a deduction for exhaustion, including obsolescence, with respect to patents, contracts, licenses, franchises, leases, and similar intangible property having a limited useful life (Petitioner's brief, pp. 21-24). The regulations under attack have been repeatedly and uniformly sustained and applied by the courts and the Board of Tax Appeals (see Appendix A hereto, p. 46, below for the authorities). With the regulations now under attack in effect, Congress has reenacted without change the language of the provision in question under which such regulations were made (Sections 234(a)(7) Revenue Acts 1921, 1924 and 1926 and Section 23(k) of the Revenue Act of 1928). None of the decisions of the lower courts, including the decision in *Red Wing Malting Company* v. *Willcuts,* upon which the Government seems particularly to rely, or of the Board of

Tax Appeals take the position now maintained by the Government that the obsolescence allowance applies only to tangible property. Consideration of the language and the purpose of the statute will clearly show that this novel and late contention which, if sustained, would involve the revision of many thousands of tax cases settled under the existing regulations, is not sound.

I.

The statute (Section 234(a)(7) of the Revenue Act of 1918) authorizing the allowance uses the term "property" without restriction or limitation, and this term is not confined in its application to property of such a nature that it was decreased, consumed or disposed of by use in the trade or business, but applies to all property, tangible or intangible, used in the business, which was in fact subject to exhaustion, wear and tear, including obsolescence.

The Petitioner's single specification of error is as follows:

> "The Circuit Court of Appeals erred in holding that the respondent was entitled under Section 234(a)(7) of the Revenue Act of 1918 to a deduction from its gross income for the fiscal year ending May 31, 1919, on account of the exhaustion, wear and tear or obsolescence of its good will, *since the statute only intended to embrace property of such a nature that it was decreased, consumed or disposed of by use in the trade or business*, and good will is not such property" (Petitioner's Brief, p. 5, italics ours).

(a) No restriction on the meaning of the word "property" or in the application of the obsolescence allowance to property generally, is expressed in the language of the statute.

The language of the statute providing for the deduction is as follows:

> "a reasonable allowance for the exhaustion, wear and tear of *property* used in the trade or business, including a reasonable allowance for obsolescence". Section 234(a)(7) Revenue Act of 1918, italics ours.

No limitation is expressed here on the word "property" or upon the application of the allowance to property generally.

The Government relies not upon the language of the statute in this connection but upon what is maintained to have been its "intent". The primary method of ascertaining the intention of Congress in enacting the statute is, however, to resort to the ordinary grammatical sense of the provision and the ordinary and familiar meaning of the words used. (*U. S.* v. *Union Pacific Railroad Company,* 91 U. S. 72; *Treat* v. *White,* 181 U. S. 264; *De Ganey* v. *Lederer,* 250 U. S. 376).

In connection with the consideration of the corresponding provision of the preceding Act, this Court very recently stated that

> "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense."
>
> *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364.

In this instance the Government is not following the plain, obvious and rational meaning expressed in the pro-

vision but is endeavoring to read into it a limitation not there expressed and to give it a narrow and hidden sense.

So far as the language of the statute is concerned the word "property", which is of course the key word in this connection, is used without limitation, qualification or restriction; the sole requirement is that the property be used in the business. As this Court has itself said of the corresponding provision of the preceding Act,

> "there is nothing to suggest that the word 'property' is used in any restricted sense."
>
> *Lynch* v. *Alworth-Stephens Co., supra.*

The omission of any limitation on the word "property" is particularly significant because it is clear that Congress in enacting the statute had in mind the distinction between tangible and intangible property. Thus in Title III, War Excess Profits Tax Title of the Revenue Act of 1918, dealing with invested capital Congress defined "intangible property" as "patents, copyrights, secret processes and formulæ, good will, trade marks, trade-brands, franchises and other like property." Section 325.

Not only does the statute fail to contain a restriction of the allowance to property "of such a nature that it was decreased, consumed or disposed of by use in the trade or business", but it represents a deliberate change from a preceding provision which did express such a restriction. Section 12(a) Second of the Revenue Act of 1916 (the corresponding provision in the prior Act) provided for a deduction from income as follows:

> "A reasonable allowance for the exhaustion, wear and tear of property *arising out of its use or employment in the business or trade.*" (Italics ours.)

As will be seen by referring to Section 234(a)(7) the Revenue Act of 1918 (p. 3 above), in drafting the new section, Congress not only added the phrase "including a reasonable allowance for obsolescence" but made another significant change in omitting altogether the limitation of the allowance to that "arising out of its use or employment in the business or trade", providing instead only that the property be "used in the trade or business." See page 29 below where we treat the change from the prior statute further. The Government while basing its entire argument on an assumed intention of the statute to confine the allowance to property of such a nature that *its use* is what occasions the allowance, in its brief makes no reference to the change in the 1918 Act omitting this requirement which appeared in the previous Act.

We submit therefore that the language of the statute is entirely clear, that it contains no limitations such as the Government suggests and that the whole position of the Government is an endeavor to read into the statute limitations which are not there.

(b) The allowance for obsolescence is as necessary for the computation of income in the case of intangible property as in the case of tangible property and therefore falls equally within the "intent" of the unrestricted language of the statute which admittedly provides such an allowance in the case of tangible property.

The allowance for obsolescence provided for by Section 234(a)(7) of the Revenue Act of 1918 covers deductions from current income to offset losses to be fully sus-

tained at reasonably predictable future dates through some drastic change in external conditions which when fully operative will destroy the value of property of the taxpayer used in the business. The Government admits that the statute provides for such an allowance in the case of tangible property (Petitioner's brief, p. 6), but notwithstanding the absence of express restriction in the Act argues that such an allowance in the case of intangible property is outside of the intent of the Act. It is therefore material to consider why any allowance for "exhaustion, wear and tear * * * including obsolescence" is made.

The allowances as deductions from current net income covered by Section 234(a)(7) are different from deductions for losses actually sustained in a taxable year covered by Section 234(a)(4) and deductions for sustained "depletion" on account of the actual removal of ore, timber, oil and the like covered by Section 234(a)(9). The deductions for these items relate to completed transactions—losses sustained or physical property removed.

The allowances covered by the section here in question all relate to future losses of property used in the business which are sufficiently certain to occur to necessitate taking them into account in determining net income. If a building or a piece of machinery used in the business has, according to experience, a fixed limit to its useful life, it is obvious that in computing current income a deduction must be made for the ultimate loss of that asset. This deduction is one of those provided for by this section and is ordinarily referred to as "depreciation".

It is equally obvious that if there is used in the business intangible property such as a valuable patent or a lease or a

special contract which on some future date will reach the end of its life, true current net income cannot be computed unless this inevitable loss of this asset is taken into account through an appropriate annual allowance.

Allowances so made do not depend upon the actual decrease or shrinkage in the value of the particular property in the current year. They are not deductions on account of completed transactions during the year, they are true "allowances" to provide against a certain loss in the future. The basis of such allowances in the case of tangible property was dealt with by this Court in *U. S.* v. *Ludey,* 274 U. S. 295. Such basis was well expressed by the Board of Tax Appeals in *Appeal of Even Realty Co.,* 1 B. T. A. 355, where the Board stated:

> "When a manufacturer sells his product, he is really selling a composite of four or five things: (1) the materials entering into the product; (2) labor that has been applied to them including the effort of executives and salesmen; (3) that proportion of the value of the machinery, and of (4) the buildings which is consumed in the manufacture of the product; and (5) in some cases, a proportionate part of the monopoly granted by patents, exhausted during the process of production. Until the manufacturer has recovered the cost or basic value to him of the proportionate parts of these items attributable to a unit of his product sold, he cannot properly be said to have received income upon its sale, and only the excess of the sale price realized over the sum of these items (whatever particular form they may take) is truly income. We feel that this would be true whether the statutes made any specific provision for their deduction or not—the computation would be just as necessary to the determination of true income as the computation of profit on a

sale by reference to the cost or basic value of the article sold. (Quoting from *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179) * * *

"Because of the difficulty of attributing to each article sold or to the sales in a taxable year an exact sum representing the proportion of basic value of machinery, buildings, patents, etc. entering into such sale, the statutes have consistently provided for a *reasonable allowance.*"

"Obsolescence" is what results to property continuously used in the business when, by some *unexpected* change, a limit is set to the period during which the property may be used. Ordinarily the useful life of property may be estimated with reasonable accuracy from the time the property is acquired. If the property be physical property the period of its probable capacity for service is known from experience. If the property be a patent, lease or contract its life is definitely fixed. Experience has shown, however, that changes affecting the business may come about which were not foreseen which, when fully operative, will end the useful life of property before it would normally end. Such a change is always external to the business itself. As the Government well states in its brief, page 26:

"Obsolescence presupposes that at a reasonably definite future date, which can be foreseen with reasonable certainty, a particular asset will finally arrive at a state of becoming useless, such uselessness not being due to exhaustion, wear or tear through use but to the fact that economic developments render it imperative that it be discarded."

Economic developments are not the sole possible cause of results here indicated: prospective legal prohibition of the

carrying on of a business is at least equally imperative. "Obsolescence" is the "state or process of becoming obsolete", and "obsolete" is "gone out of use; no longer in use" (Century Dictionary and Encyclopedia).

Obsolescence of property—that is the approaching of a previously unexpected termination of its useful life—obviously affects the determination of income in exactly the same way as the normal approach of the end of useful life. In any case where a limit has been set to the useful life of the property continuously used, whether that limit was foreseen or was originally unforeseen, the ultimate loss of the asset must be taken into account through appropriate annual allowances in reckoning current net income. Exhaustion and obsolescence being specifically provided for in Section 234(a)(7) of the 1918 Act, nothing in the nature of or reason for the allowance provided for, therefore, suggests that any limitation of its application to tangible property must be read into the statute. As the court below stated (R. 308):

> "Every consideration which justifies allowance for the 'obsolescence' of the tangibles because of the compulsory future discontinuance of the business ought to create a similar allowance for the good will."

The Government in defending its position urges that

> "In deciding such a question argument addressed to the economic wrong involved in the imposition of a tax is beyond judicial cognizance" (Petitioner's brief, p. 15).

Where the clear words of the statute involve economic wrong through its application, argument addressed to that wrong is indeed of no force. This accepted principle, how-

ever, by no means establishes that the natural and rational meaning of the statute may be discarded in favor of a hidden construction which would work an economic wrong and injustice in the application of the statute. If there is any doubt as to the meaning of the terms employed in a statute,—including terms in a tax statute which authorize a particular deduction in computing income,—that construction is to be favored which makes the statute apply consistently to all cases affected by it and which does not restrict the deduction to certain classes of cases while denying it in other cases falling equally within the principle underlying the deduction.

(c) The including of the obsolescence allowance in or with the "exhaustion, wear and tear" allowance has no tendency to show that the allowance is restricted to the obsolescence of tangible property. Exhaustion itself applies to intangible property as well as to tangible property, and the history of the statute indicates no limitation in its application.

The Government's contention is that the statute

> "only intended to embrace property of such a nature that it was decreased, consumed and disposed of by use in the trade or business" (Petitioner's brief, p. 5).

As shown above, this contention is not based upon any express limitation in the language of the statute. Nor is it based on any expression of intent to limit the natural and rational meaning of the statutory language expressed in the report of any Congressional Committee or in the report of any debate on the Act in Congress. The limitation which,

through an assumed intent, the Government seeks to place upon the word "property" appears to be based wholly on its view as to the meaning of the word *"exhaustion"*. The position of the Government appears to rest upon the following propositions:

(1) The terms exhaustion, wear and tear, in or with which the obsolescence allowance is included, mean in the dictionary sense only processes that can happen to physical property;

(2) Exhaustion, wear and tear must result from use of the property, and intangible property is not subject to exhaustion, wear and tear through use;

(3) As a matter of statutory history, the allowance for obsolescence was added to a phrase which related only to allowances for physical property and hence was intended to cover only physical property.

It is submitted that none of these propositions finds support in the language of the statute or its history.

(1) The term "exhaustion" in or with which the obsolescence allowance is included, is not confined to physical consumption, lessening or diminution of tangible property, but includes the exhaustion of the value or usefulness of intangible property having a limited useful life through lapse of time.

The word "exhaustion" does not connote merely the consumption of physical property. Ordinary dictionary definitions may look primarily to the physical meaning of

the term, but the dictionaries show that the term has a wider range of meanings. Webster's International Dictionary defines "exhausted" as *"deprived of essential characteristics or properties;* deprived of its proper qualities or virtues"; Murray's New English Dictionary defines "exhaust" as "to use up completely (either a material or immaterial thing)".

Should there be any doubt as to the meaning of the word "exhaustion" in the statute, more light as to its meaning is to be derived from the usage of that term in Federal tax practice than from dictionaries. There can be no doubt that as used for many years by the Bureau of Internal Revenue in connection with income tax statutes, the term has been accepted as covering the loss of property through the gradual expiration of its economic life and not merely through loss of physical content. In the light of that usage accepted and expressed in the regulations, the Revenue Acts of 1921, 1924, 1926 and 1928 have reenacted the exact language of Section 234(a)(7) of the 1918 Act here in question.

In *Article 137 of Regulations 33* (1914) it is stated:

> "The deduction claimed for *exhaustion* of the capital assets as represented by patents to be made in the return of annual net income of a corporation for any given year shall be one-seventeenth of the actual cost of such patents reduced to a cash basis." (Italics ours.)

Here is an early instance of the use of the word exhaustion to refer to what happens to a patent through lapse of time, notwithstanding the fact that the basis for the exhaustion allowance here prescribed is the cost of the patent.

In *Article 162 of Regulations 45* (1919) it is said:

> "The necessity for a depreciation allowance results from the fact that certain property used in the business gradually approaches a point where its *usefulness is exhausted.* The allowance should be confined to property of this nature. In the case of tangible property, it applies to that which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence due to the normal progress of the art or to becoming inadequate to the growing needs of the business." (Italics ours.)

In *Article 163 of Regulations 45* (1919) it is stated:

> "Intangibles, the use of which in the trade or business is definitely limited in duration may be the subject of a *depreciation* allowance. Examples are patents and copyrights, licenses and franchises." (Italics ours.)

The meaning of the word "depreciation" as here used is made clear by Article 161 of Regulations 45, which reads:

> "A reasonable allowance for the exhaustion, wear and tear and obsolescence of property used in the trade or business may be deducted from gross income. For convenience such an allowance will usually be referred to as covering *depreciation,* excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence." (Italics ours.)

Article 167 of Regulations 45 deals specifically with depreciation of patents.

In *Appeal of Grosvenor Atterbury,* 1 B. T. A. 169, the Board of Tax Appeals said:

> "The term *exhaustion* used in all four sections properly describes the reduction in the remaining life of a leasehold as it approaches year by year, its termination." (Italics ours.)

In *Appeal of Union Metal Manufacturing Company,* 1 B. T. A. 395, the Board of Tax Appeals said, with respect to patents:

> "It may be that in some cases patents *appreciate* in value for a time and that there is no *depreciation* in the broader sense of the word, but by the very nature of a patent it is invariably subject to *exhaustion,* and the right to a deduction therefor is not precluded by the existence of an appreciation which may or may not be realized at some future time, but which is only taxable when realized. Everything we said in the *Even Realty Co. appeal,* 1 B. T. 355, with respect to deductions for wear and tear of machinery and buildings and in the *Appeal of Grosvenor Atterbury,* 1 B. T. A. 169 with respect to *exhaustion* of leases, applies equally to deductions for *exhaustion* of patents." (Italics partly ours.)

In *T. D. 3760,* IV-2 C. B. 154 (1925), the Bureau of Internal Revenue held:

> "A lessee is entitled under the Revenue Acts of 1916, 1917, 1918 and 1921 to an allowance for the *exhaustion* of a lease used in trade or business based on the value of the lease as of March 1, 1913, if acquired prior thereto." (Italics ours.)

In *Philip Henrici Co.* v. *Reinecke,* 3 F. (2d) 34, the District Court said:

> "Just as surely as time passes, the admitted $370,000 market value of this lease on March 1, 1913, will be wholly *exhausted* on April 30, 1928; and unless the plaintiff shall have had the right of deduction from year to year of this, its capital so *exhausted* in the business, it will not only have consumed in its business this capital sum, but will have been obliged to pay an income tax upon it—a result which I believe the law did not intend and does not require." (Italics ours.)

In *Appeal of Manhattan Brewing Company,* 6 B. T. A. 952, at 960, the Board of Tax Appeals said:

> "Patents, copyrights, leaseholds, and similar intangibles do not suffer any physical deterioration in use, but, as their life is limited by contract, *they decrease in value or become exhausted by the mere passage of years.* Ordinarily the annual allowances for the *exhaustion* of such property is an aliquot part of their cost or capital value at March 1, 1913, for the number of years to elapsé prior to the termination of the contract period, but in extraordinary conditions, as with tangibles, the allowance for *exhaustion* may be increased to include obsolescence." (Italics ours.)

This court in *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, applied the term "exhaustion" to property of an intangible nature although the allowance in the instance then before the court was measured by actual physical exhaustion. That case involved the claim of a lessee of mining property for a deduction for exhaustion or depletion of the March 1, 1913, value of its lease under the provisions of the Revenue Act of 1916. The controversy arose because

the taxpayer did not own the ore deposit. The Court held that the lessee had no title to the unextracted ore deposits, but that he owned leases conferring upon him the exclusive possession of the deposits and the valuable right to removing and reducing the ore to ownership, and that he was entitled to a deduction for the exhaustion of his interest under the leases. The Court said:

> "The general provision in Section 12(a) second, is that the deduction from gross income shall include a reasonable allowance for the 'exhaustion * * * of property'. *There is nothing to suggest that the word 'property' is used in any restricted sense.* In the case of mines, a specific kind of property, the exhaustion is described as depletion, and is limited to an amount not exceeding the market value in the mine of the product mined and sold during the year. *The interest of respondent under its leases in the mines being property, its right to deduct a reasonable allowance for exhaustion of such property, if there be any, during the taxable year results from the plain terms of the statute,* such deduction, since the property is an interest in mines, to be limited to the amount of the exhaustion of respondent's interest caused by the depletion of the mines during the taxable year.
>
> * * * * * *
>
> "It is said that the depletion allowance applies to the physical exhaustion of the ore deposits, and since the title thereto is in the lessor, he alone is entitled to make the deduction. But the fallacy of the syllogism is plain. The deduction for depletion in the case of mines is a special application of the general rule of the statute allowing a deduction for exhaustion of property. *While respondent does not own ore deposits, its right to mine and remove the ore and reduce it to possession and ownership is property within the meaning*

of the general provision. Obviously, as the process goes on, this property interest of the lessee in the mines is lessened from year to year, as the owner's property interest in the same mines is likewise lessened. *There is an exhaustion of property in the one case as in the other;* and the extent of it, with the consequent deduction to be made, in each case is to be arrived at in the same way, namely, by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based upon the market value of the product, and allocating that amount in proportion to the interest of each severally considered." (Italics supplied.)

While this decision of the Court necessarily applies only to a mining lease, the reasoning clearly indicates a refusal to regard the meaning of the word "exhaustion" as restricted to the consumption of physical property owned by the taxpayer. It is clear that a taxpayer cannot claim a deduction for exhaustion, wear and tear of physical property owned by some one else, even if he is a lessee of the property. *Weiss* v. *Weiner,* 279 U. S. 333.

On the basis of the decision in *Lynch* v. *Alworth-Stephens Co., supra,* the Bureau of Internal Revenue, the Board of Tax Appeals, and the lower courts have allowed deductions for exhaustion of leases, (which was denied for a time—see Appendix A, p. 47) not only of mining property, but of land and buildings, and agricultural lands.

T. D. 3760, IV-2, C. B. 154.

Appeal of Grosvenor Atterbury, 1 B. T. A. 169.

Oahu Sugar Company v. *Commissioner,* 13 B. T. A. 404.

As pointed out elsewhere in the brief, Congress through reenacting the governing provision as part of

succeeding tax statutes has in effect adopted the meaning of the word exhaustion consistently applied to it by the Bureau of Internal Revenue.

These precedents conclusively establish that the meaning of the word "exhaustion", even without enlargement to include obsolescence, cannot properly be restricted to physical consumption of tangible property. The word has no such fixed and restricted meaning.

It would be difficult to find a term other than "exhaustion" which expresses what happens to a patent, contract or lease from the standpoint of the taxpayer. No other term is in use which covers the loss of value resulting from lapse of time.

Unless the term "exhaustion" as used in Section 234(a)(7) covers the loss of value through lapse of time, it is difficult to see that it has any application in the statute. Obviously it is not used to express the same idea as "wear and tear"—it is of equal importance and is to be given its own independent weight. The limitation of "exhaustion" to "physical exhaustion", as in the case of a mine, as claimed by the Government, gives no scope for its application because exhaustion in that sense is separately dealt with under this statute as depletion (Section 234(a)(9)). Even the case of a lessee of a mining property or other natural deposit is specifically taken care of in the Revenue Act of 1918 under Section 234(a)(9). *Under the Government's contention, the word "exhaustion" serves no useful purpose in the statute.* The Government's position thus seems to violate the established canon of statutory construction that every word in the Act must be given weight.

(2) The Revenue Act of 1918 does not require that exhaustion of property result from use of the property in the business.

Section 234(a)(7) provides for "a reasonable allowance for exhaustion, wear and tear of property *used in the trade or business,* including a reasonable allowance for obsolescence". The statute does not provide that exhaustion, wear and tear must result from the use of the property. Exhaustion may result from mere lapse of time. Obsolescence of property, of course, as the Government states in its brief, never results from use, but always from a change in external conditions (see p. 17 above). The petitioner's argument that the statute applies only to property subject to exhaustion, wear and tear *by use* thus reads into the statute a requirement which is not there and logically applied reads out any obsolescence allowance in any case whatsoever.

(3) The legislative history not only does not support the petitioner's contention that exhaustion applies only to tangible property, but indicates that no such restriction was intended.

In taking the position that the allowance provided for by the section in question applies only to physical property, the Government places great reliance upon the contention that, as a matter of statutory history, the allowance for obsolescence was added to a phrase which related only to the allowance for exhaustion, wear and tear of physical property, and hence, it is contended, was intended to cover only physical property. In making this contention, however, the Government has apparently wholly ignored the

fact that, as indicated above, page 13, the language of the 1918 Act on this precise point differed radically from the language of the prior Act. In adopting the provisions of the 1918 Act Congress did away with any requirement that the allowance should result from any use of the property.

The Revenue Act of 1916, Section 12(a) Second, provided for a deduction from income as follows:

> "a reasonable allowance for the exhaustion, wear and tear of property *arising out of its use or employment in the business or trade.*" (Italics ours.)

The Revenue Bill of 1918, as passed by the House, provided, in language ultimately incorporated in the statute, for the deduction from income of

> "A reasonable allowance for exhaustion, wear and tear of property *used in the trade or business.*" (Italics ours.)

A significant change from the language of the 1916 Act was here made, specifically removing the requirement that exhaustion, wear and tear result *from use,* and making the deduction apply to all business property subject to exhaustion, wear and tear, whether resulting from use or not. This significant change in the language was made before the provision as to obsolescence was considered. This change is not referred to in the petitioner's brief.

The Senate amended the provision of the House Bill to read:

> "a reasonable allowance for *depreciation* of property used in the trade or business." (Italics ours.)

The Conference Committee changed the provision to read as it now appears in the law:

> "a reasonable allowance for exhaustion, wear and tear

of property used in the trade or business, including a reasonable allowance for obsolescence."

(See Conference Committee Print H. R. 12863, 65th Congress, 3rd Session, Sec. 234(a)(7).)

As a matter of practice, even the provision of the Revenue Act of 1916 was not in fact confined in its application to tangible property.

Lynch v. *Alworth, Stephens Co., supra;*
Kaufman-Straus v. *Lucas,* 12 F. (2d) 774;
Oahu Sugar Company v. *Commissioner,* 13 B. T. A. 404;
T. D. 3760, IV-2 C. B. 154.

The petitioner's attempt to distinguish the admitted rulings of the Treasury permitting an allowance for the exhaustion of patents under the 1916 Act on the theory that the whole cost of the patent was treated as "prepaid business expense" is unsound. The same suggestion could of course be made as to the treatment of the cost of any capital asset having a limited useful life. The suggestion ignores the fundamental accounting distinction between capital expenditures and current expenditures.

Regulations under prior acts upon which petitioner relies, denying a deduction for depreciation of good will, such as T. D. 1675, Art. 163, Regulations 33 and Articles 167 and 168 of Regulations 33 (revised) all dealt with the ordinary case where good will had an indefinite life and value. None of them dealt with cases where the useful life of the good will was definitely limited. Before the *Red Wing Malting* decision the Treasury made no distinction between patents and good will having a limited life, but on the contrary treated them as having the same status with reference to the deduction (p. 6 above).

The Government's treatment of the legislative history not only ignores the significant change in the statute, as has been pointed out, but proceeds upon the mistaken theory as to how Congress proceeded in formulating this deduction. The theory of the Government appears to be that the first and fundamental thought of the legislative body was as to the *class of property* to which the deduction should apply, and the secondary thought was as to the provisions relating to the deduction. (Petitioner's brief, p. 19.) The contrary appears to have been the case. The section provides for a deduction resulting from conditions which may affect any property, and in providing for the deductions the term "property" was used without restriction. There is not the slightest indication from the history of the statute that Congress at any time intended to deal with a particular class of property only, or to exclude any property used in the business which was in fact subject to exhaustion, wear and tear, including obsolescence.

(d) Limiting the application of Section 234(a)(7) to tangible property is contrary to uniform rulings of the Treasury Department, in force for over ten years and still in effect, which have been approved by the Board of Tax Appeals and the courts and by Congress through reenactment of the governing provisions.

In its first Regulations under the Revenue Act of 1918, the Treasury Department held

> "Intangibles, the use of which in the trade or business is definitely limited in duration, may be the subject of a depreciation allowance. Examples are patents and copyrights, licenses and franchises." Article 163, Regulations 45 (April 1919).

This language has appeared in all subsequent Regulations. Article 163, Regulations 45 (1920), Regulations 62 (1922), Regulations 65 (1924) and Regulations 69 (1926); Article 203, Regulations 74 (1929).

In T. D. 3760, IV-2, C. B. 154 (1925), the Bureau held that an allowance for exhaustion was proper as to all leases under the Revenue Acts of 1916, 1917, 1918 and 1921, although for a time it had refused to allow this deduction.

The rulings applying the statute to intangible assets, including patents, copyrights, licenses, franchises, contracts and leases have been repeatedly approved by the Board of Tax Appeals and the courts and are still in full force and effect (see Appendix A, p. 46 below). The Bureau of Internal Revenue is every day approving allowances in respect of intangible assets, now maintained here to be unauthorized. These rulings, under which the allowances are made, were accepted by Congress through reenactment of the provision without change. (See p. 10 above.) The adoption of the position now contended for by the Government, invalidating the prior rulings, would of course require a revision of the tax computation which has been made under those rulings in the case of many thousands of taxpayers.

The presumption is, of course, that the long continued uniform construction of the statute by the Treasury Department, the Board of Tax Appeals and the courts is correct—

Edwards v. *Darby*, 12 Wheat. 206;
Robertson v. *Downing*, 127 U. S. 607;
U. S. v. *Healey*, 160 U. S. 136;
U. S. v. *Falk*, 204 U. S. 143;
National Lead Co. v. *U. S.*, 252 U. S. 140.

II.

The reasonable allowance for obsolescence, authorized by Section 234(a)(7) of the Revenue Act of 1918, applied to the good will property of a brewing company, when the future destruction of that good will through the adoption of the prohibition amendment became a certainty.

(a) Good will is property used in such business.

The Government rests its case primarily on the ground that the statute does not apply to any intangible property. It does not deny that good will is property. Nor does it seriously contend that good will is not used in the business. As to these propositions there can be no serious controversy.

Good will is property in and of itself. It is intangible in nature. It is something that may be the subject of ownership, may be transferred, and may be protected by law. The term "property" includes good will. The importance of good will property in recent years has been universally recognized.

28 Corpus Juris, 730;

Metropolitan Bank v. *St. Louis Dispatch Co.,* 149 U. S. 436;

Coca Cola Bottling Co. v. *Coca Cola Co.,* 269 Fed. 796;

Washburn v. *National Wall Paper Co.,* 81 Fed. 17.

The Revenue Act of 1918 treats good will as property for invested capital purposes, including it within the definition of intangible property. *Section 325.*

Good will cannot be transferred separate and apart from the business, it fluctuates in value, and in the ordinary case it has an indefinite life. But none of these facts indicate that good will is not property. The court in the *Red Wing Malting* case, *supra,* and the Board of Tax Appeals in *Appeal of Manhattan Brewing Company, supra,* both held that good will was property. Good will has an independent value separate and apart from the value of the tangible assets employed in the business to which it relates. Compensation for the value of the tangible assets would not be compensation for the value of the good will.

Good will property is clearly used in the business exactly as patents, contracts, leases and other intangible assets are used in the business.

Philip Henrici Co. v. *Reinecke,* 3 Fed. (2d) 34;
Kaufman-Straus Co. v. *Lucas,* 12 Fed. (2d) 774.

Good will is therefore "property used in the trade or business" under Section 234(a)(7) of the Revenue Act of 1918.

(b) The good will property of brewing companies was rendered obsolescent in fact when the adoption of prohibition at an ascertainable future date became a certainty.

The Government in its brief here apparently recognizes that if patents, leases and contracts are regarded as subject to exhaustion and obsolescence, good will, having a limited life, must be likewise regarded, and bases its entire position

upon the proposition that the obsolescence allowance has no application to any intangible assets.

In view, however, of the attempted distinction between good will and other intangible assets made by the Court in the *Red Wing Malting* case and by the Board of Tax Appeals in the *Manhattan Brewing Co.* case, some space is taken to show that taxpayer's good will was, in fact, subject to obsolescence during the year ending May 31, 1919.

When the adoption of prohibition at a future date became a certainty, as it did by January 31, 1918, the good will of a brewing company then became property having a definitely limited life, of the same general character as patents, contracts or leases having a limited life, and hence subject to exhaustion or obsolescence. *This is essentially a question of fact, which is settled by the findings of the referee* (R. p. 207).

Good will, like any other asset, can be destroyed if the business of which it forms a part is destroyed. It can become obsolete if the business becomes obsolete. It can be subject to obsolescence if the business is in the process or state of going out of use or becoming obsolete. Under *ordinary* circumstances the life of good will is indefinite and undeterminable. But this is wholly immaterial because under the unusual circumstances created by the impending adoption of Federal prohibition it became clear that the value of the good will of a brewing company would within a short time be destroyed. It was, therefore, in fact becoming obsolete.

On this point the court below said:

> "It is further urged that good will differs from other property subject to depreciation allowance,

because good will has no existence except in connection with a going business and cannot be transferred apart from it. Of course, that is true; but its materiality to the present issue is not apparent. A going business has a value over and above the aggregate value of the tangible property employed in it. Such excess value is nothing more than a recognition that, used in an established business that has won the favor of its customers, the tangibles may be expected to earn in the future as they have in the past. The owner's privilege of so using them, and his privilege of continuing to deal with customers attracted by the established business, are property of value. This latter privilege is known as good will. It can, it is true, be exercised only in connection with the exercise of the former; hence it cannot be separately assigned, and legislation which cuts short the use of tangibles in the business necessarily limits also the good will. Every consideration which justifies allowance for the 'obsolescence' of the tangibles because of compulsory future discontinuance of the business ought to create a similar allowance for the good will" (R. 308).

Mr. Trammell, in his dissenting opinion in *Appeal of Manhattan Brewing Co.*, 6 B. T. A. 952, at page 967, said:

"Conceding that good will, under ordinary circumstances, is not subject to exhaustion, it does not follow that it is never subject to exhaustion. It is not ordinarily, because, under usual circumstances and conditions, it continues and has an indefinite life. But there is nothing inherent in its nature that makes it impossible under any circumstances for its life to be made definite and limited in duration. It is, in any case, a question of fact to be determined whether its

useful life for any cause arising before or after its acquisition has become limited in duration. If it can be established as a fact that good will has in a particular case become limited in duration, it seems clear that the provision of the statute allowing a deduction on account of exhaustion, including obsolescence, is just as applicable to such property as to any other property. Actual facts in the particular cause before us are controlling over general principles or theories as to what the facts ordinarily are. If the taxpayer's good will did in fact exhaust or was becoming obsolete, the fact that good will ordinarily does not exhaust or depreciate seems to me to be immaterial. The statute is certainly broad enough in its terms to allow the deduction if the fact of obsolescence can be shown. It seems to me that this reduces the question to one of fact, that is, whether during the taxable year the taxpayer's intangible assets were in the process of becoming obsolete or losing their useful value."

If a taxpayer purchased a brewery, and the good will of the brewery business, after the useful life of the good will had been limited, the deduction of annual allowances to cover the cost of the good will clearly would be deductions for exhaustion, just as in the case of a patent or contract having a limited life, and would clearly be allowable under the provisions of the Revenue Act of 1918. Where, as in this case, the life of the good will became limited by some change in external conditions after its acquisition, the annual allowances thereafter to cover the cost of such good will are of precisely the same nature, but may properly be termed allowances for obsolescence, because the useful

life of the good will property has been determined by change in external conditions arising after its acquisiti by the taxpayer.

As stated by the court below:

> "The Referee has found that on January 31, 19 it was reasonably certain that prohibition legislati would be adopted in the near future and that after t Prohibition Amendment became effective on Janua 16, 1920, the plaintiff's good will came to an e Consequently on January 31, 1918, it had beco known that the plaintiff's good will would termin in 715 days. If anyone had purchased plainti brewery and good will on that date, paying, for ill tration, $50,000 for the good will, why should that capital investment of $50,000 be depreciated d ing the limited period of the life of the asset p chased, just as would be done in the case of the p chase price of a patent or a lease having still 715 d to run? In each case the owner has full and conti ous enjoyment while his right endures. It is a conv tion to say that the asset is used up day by day, a c vention adopted to spread the loss equitably. patentee's right or the lessee's are as complete in last year as before; only they will come to an end this good will. To us the cases seem precisely a in this regard, and that every consideration wh justifies spreading the loss in one case justifies spre ing it in the other" (R. 307).

What is in question here is not an allowance for crease in the value of the good-will, as the Governm appears to suggest in its brief (p. 28). It is an allowa based on the fact that the whole value of the good will to be destroyed on the taking effect of prohibition in Ja

ary, 1920. As this made the good will obsolescent, the loss must be spread over the period between the time when this loss of value became inevitable and the time when it occurred. The allowance no more involves the actual fluctuation in value from period to period than the allowance for depreciation or for exhaustion of a patent or the like. The basis for the computation of the allowance in this case, if permitted by the statute, was agreed upon by the parties (R. 206).

Since the taxpayer's good will was property used in its brewing business, and in the course of becoming obsolete during the year ending May 31, 1919, the taxpayer was entitled under the provisions of Section 234(a)(7) of the Revenue Act of 1918 to deduct an allowance for such obsolescence.

III.

There is nothing in the Red Wing Malting opinion or elsewhere which establishes any basis for denying, in the case of good will having a limited useful life, the reasonable allowance for exhaustion, including obsolescence, permitted with respect to other kinds of property.

In view of the petitioner's extensive quotation from the opinion of the court in the case of *Red Wing Malting Co.* v. *Willcuts, supra,* the argument made by that court is here considered, although the brief of petitioner, in its argument on principle, departs from the reasoning of the court.

The underlying theory of the court in the *Red Wing Malting* decision is succinctly stated in the following paragraph:

> "We are satisfied that there can be no wear or tear of good will, or exhaustion thereof *by use,* and, even should we assume that good will, separate and distinct from tangible property, is property used in the business, section 234(a), subdivision (7) of the 1918 Revenue Act limits the allowance for obsolescence to such property as is susceptible to exhaustion, wear and tear *by use* in the business, and good will is not such property" (15 F. (2d) 626, 633). (Italics ours.)

The holding of the court that the 1918 statute requires that exhaustion, wear and tear result *by use,* is erroneous for the reasons stated above (p. 28). The court was led

into this error largely by its misapprehension as to the legislative history. It says:

> "When the Revenue Act of 1918 was before the Congress, the House wrote a provision the same as in the 1916 and 1917 Acts, providing an allowance for 'exhaustion, wear, and tear', of property."

This is incorrect. The 1916 Act read: "Exhaustion, wear and tear of property *arising out of its use in the business or trade.*" The 1918 House Bill read: "Exhaustion, wear and tear of property *used in the trade or business*" (see *supra,* p. 29). The court failed to notice this change, and was thus led to base its opinion on the precise meaning of the word *"including",* a question which is largely immaterial when it is realized that under the 1918 Act exhaustion, wear and tear need not result by use, and hence that, on any theory, there is no basis for limiting the property, to which the statute is applicable, to property subject to exhaustion, wear and tear by use.

The court held that "including" did not mean "and", that the added phrase did not add "a new and independent deduction", and that the phrase was but "a part of and an enlargement of the previous phrase of said sub-section (7) relating to exhaustion, wear and tear". The quotation made by the court from *Blanck, et al.* v. *Pioneer Mining Co., et al.,* 93 Wash. 26, indicates that it regarded the word "including" as a term of enlargement and not a term of limitation, and that it enlarged the otherwise more limited preceding language by introducing the element of obsolescence. So construed, the statute would read "a reasonable allowance for exhaustion, wear and tear (enlarged

to include obsolescence) of property used in the trade or business". Since exhaustion includes exhaustion of value by lapse of time as well as physical exhaustion, and obsolescence always results not from use but from a limitation of useful life by a change in external conditions (see pp. 20 and 17 above), there is nothing in the statute so read to indicate that its application is limited to physical property which is decreased, consumed or disposed of by use.

While the elaborate argument of the Court as to "including" seems beside the point as above indicated, it may be noted that the word "including" often is used in the sense of "and". A striking case of the use of the word "including" in the sense of "and" occurs in the very statutes under consideration.

The Revenue Act of 1916 under Section 12(a) Second provides for the deduction of:

> "All losses actually sustained and charged off within the year and not compensated by insurance or otherwise, *including* a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade." (Italics ours.)

Earlier statutes had used the word "including" in the same way. Corporation Excise Tax Law of Aug. 5, 1909, Sec. 38, paragraph second; Income Tax Law of Oct. 3, 1913, Sec. 2, G. (b).

Obviously the deduction for exhaustion, wear and tear is something entirely distinct and separate from and additional to the deduction for losses actually sustained and charged off. In this provision the word "including" clearly

means "and." Cp. Section 5(a) Revenue Act of 1916; Section 234(a)(4) and (7) Revenue Act of 1918. The draftsmen of Section 234(a)(7) of the Revenue Act of 1918 thus had immediately before them a statute clearly using the word "including" in the sense of "and".

See also

Article 161, Regulations 45 (1919).
Article 201, Regulations 74 (1929).
U. S. v. *Pierce,* 147 Fed. 199.
Hiller v. *U. S.,* 106 Fed. 73.
Sullivan Machinery Company v. *U. S.* 168 Fed. 561.
Jacksonville Terminal Co. v. *Blanshard,* 77 Fla. 855; 82 So. 300.

The question is not what the word "including" means when describing property or a bequest, as in the case of *Montello Salt Company v. Utah,* 221 U. S. 452, but what it means in this Revenue Act, in view of the language and purpose of the statute.

As stated above, the court in the *Red Wing Malting Co.* case did not place its decision on the ground that no intangible property was subject to the provisions of Section 234(a)(7), the main ground now urged by the Government. On the contrary, the court attempted to distinguish good will from other intangible assets. It said:

> "Good will is property of an intangible nature. It differs from such intangibles as patents, copyrights, licenses and franchises because while in a certain sense it inheres in and is used in the business, it is not subject to depreciation as that term is commonly understood and commonly used in the statutes."

The court then quotes accounting authorities to show that good will is not subject to depreciation, all of these, of course, dealing with good will in the ordinary case of a continuing business where the good will has an indefinite life, and not with the case before the court, where the good will had a fixed remaining useful life.

In *Appeal of Manhattan Brewing Co.*, 6 B. T. A. 952, the Board of Tax Appeals expressly said that intangible assets such as patents, copyrights and leases were subject to exhaustion and obsolescence (p. 960), but attempted to differentiate good will from such assets on the ground that good will was an inseparable part of the business which ordinarily did not have a limited life.

The Government, in its brief, suggests no new distinction between good will and other intangible assets (see pp. 27, 28, Petitioner's brief).

The differences between good will and other intangible assets so suggested are (1) that good will is an integral part of a going business, and (2) that it does not depreciate *in the ordinary case*, but merely flunctuates in value. These differences are, however, immaterial as applied to a case where the good will in fact has a limited useful life and is being totally destroyed by prohibitory legislation together with the business of which it is a part. Recognition of the unsoundness of the attempted differentiation is presumably the reason for the Government's reliance on the wholly novel contention that Section 234(a)(7) applies only to physical property.

IV.

The decision of the Circuit Court of Appeals should be affirmed.

The taxpayer had a good will in connection with its brewery business which was worth $174,482.64 on March 1, 1913. From January 31, 1918 it was apparent that the brewery business and the useful life of the brewery good will would terminate not later than January 16, 1920. During such period the good will property used in the business was in the state of becoming obsolete—its value was being exhausted by lapse of time. The taxpayer's good will was wholly destroyed by prohibition legislation. The statute provides without restriction for the deduction of a reasonable allowance for exhaustion, including obsolescence, of property used in the trade or business. The taxpayer should therefore be allowed to deduct from income of the year ending May 31, 1919, the amount which has been agreed upon by the parties as a reasonable allowance for such year for the obsolescence of its good will. The decision of the Circuit Court of Appeals herein should be affirmed.

Respectfully submittted,

ARTHUR A. BALLANTINE,
GEORGE E. CLEARY,
Attorneys for The Haberle Crystal Springs Brewing Company, Respondent.

APPENDIX A.

Rulings and decisions holding that deductions for exhaustion, wear and tear, including obsolescence, are allowable with respect to intangible, as well as tangible, property.

The Regulations of the Bureau of Internal Revenue have uniformly construed the word "property" as used in Section 234(a)(7) of the Revenue Act of 1918 and similar sections, as including intangible property. Article 163 of Regulations 45, 62, 65 and 69, and Article 203 of Regulations 74, issued under the Revenue Act of 1918, 1921, 1924, 1926 and 1928, respectively, provide as follows:

> "Intangibles, the use of which in the trade or business is definitely limited in duration, may be the subject of a depreciation allowance. Examples are patents and copyrights, licenses, and franchises."

The Bureau of Internal Revenue has from the outset allowed a deduction for exhaustion of patents and copyrights.

Article 137, Regulations 33. (Issued under 1913 Income Tax Law.)

Article 174, Regulations 33, Revised. (Issued under Revenue Acts of 1916, 1917.)

Article 167 of Regulations 45, 62, 65 and 69. (Issued under Revenue Acts of 1918, 1921, 1924 and 1926.)

Article 207, Regulations 74. (Issued under Revenue Act of 1928.)

After first deciding to the contrary (T. D. 3414, I-2 C. B. 90, November 25, 1922), the Bureau of Internal Revenue allowed a deduction for exhaustion of leases, this decision being made after decisions by the courts and Board of Tax Appeals that leases were property subject to exhaustion. *T. D. 3760, IV-2,* C. B. 154 (issued October 10, 1925), provides:

> "A lessee is entitled under the Revenue Acts of 1916, 1917, 1918 and 1921 to an allowance for the exhaustion of a lease used in trade or business based on the value of the lease as of March 1, 1913, if acquired prior thereto. In the case of a lease acquired by purchase subsequent to March 1, 1913, for use in trade or business, the purchaser may take as a deduction in his return an aliquot part of the amount paid for the lease based on the number of years the lease has to run."

The deduction for exhaustion of leases is not limited in practice to leases of depreciable or depletable property, such as buildings or mines, but applies as well to leases of agricultural land, and leases of land and buildings.

There are many rulings of the Bureau of Internal Revenue dealing with various aspects of the exhaustion, wear and tear, including obsolescence, of intangible property, but there is no ruling taking the position that the statute does not provide for such deductions with respect to intangible property because of its character as such.

This uniform practice of the Bureau of Internal Revenue in treating the word "property" as used in the statute in question as including intangible property, has been uni-

formly approved by the Board of Tax Appeals and by the courts.

Lynch v. *Alworth-Stephens Co.*, 267 U. S. 364. (Exhaustion of lease of mining property.)

Kaufman-Straus Co. v. *Lucas*, 12 F. (2d) 774 (6th C. C. A.). (Lease.)

Philip Henrici Co. v. *Reinecke*, 3 F. (2d) 34. (Lease.)

"Just as surely as time passes, the admitted $370,000 market value of this lease on March 1, 1913, will be wholly exhausted on April 30, 1928; and unless plaintiff shall have had the right of deduction from year to year of this, its capital so exhausted in the business, it will not only have consumed in its business this capital sum, but will have been obliged to pay an income tax upon it—a result which I believe the law did not intend and does not require" (p. 36).

United Profit-Sharing Corporation v. *United States* Ct. Cl. (June 18, 1928). (Contract.)

Perfect Window Regulator Co. v. *United States*, Ct. Cl. (June 18, 1928). (Patent.)

International Curtis Marine T. Co. v. *United States*, 63 Ct. Cl. 597. (Patent license contract.)

Kentucky Tobacco Products Co. v. *Lucas*, 5 F. (2d) 723. (Contract.)

Legett & Platt Spring Bed Co. v. *Crooks.* D. C. W. D. Mo. (1929). (Patent.)

Appeal of Hotel de France Co., 1 B. T. A. 28. (Lease of hotel.)

Appeal of Grosvenor Atterbury, 1 B. T. A. 169. (Lease of building.)

Appeal of Union Metal Manufacturing Co., 1 B. T. A. 395. (Patents.)

"We have been shown nothing in any of the Revenue Acts nor in general rules of law to the effect that deductions for exhaustion, wear and tear or obsolescence in the computation of taxable income should be governed by one rule in the case of tangible assets and leases and by another rule in the case of patents. * * *

Section 214(a) (8) of the Revenue Act of 1918 provides for a deduction of a reasonable allowance for exhaustion, etc., of *property used in the trade or business*. We know of no ground for holding that this means *all property except patents*" (p. 398). (Italics by the Board.)

Appeal of Service Recorder Co., 2 B. T. A. 96. (Patent license agreement.)

Appeal of Atlantic Carton Corp., 2 B. T. A. 380. (Contract.)

Appeal of St. Louis Screw Co., 2 B. T. A. 649, 659. (Patents.)

Appeal of J. J. Gray, Jr., 2 B. T. A. 672. (Patents.)

Appeal of The Topeka Tent & Awning Co., 3 B. T. A. 521. (Patents.)

Appeal of H. B. Hill, 3 B. T. A. 761. (Contract.)

Appeal of Individual Towel & Cabinet Service Co., 5 B. T. A. 158. (Patent application after issuance of patent.)

Autovent Fan & Blower Co. v. *Commissioner,* 5 B. T. A. 282. (Patent.)

Appeal of Nice Ball Bearing Co., 5 B. T. A. 484. (Patent.)

Appeal of J. M. & M. S. Browning, 6 B. T. A. 914. (Right to receive royalties under patent license agreement.)

Appeal of Secor Hotel Co., 7 B. T. A. 158. (Lease of hotel.)

Deltox Grass Rug Co. v. *Commissioner,* 7 B. T. A. 811. (Patent.)

Charles G. Barnes et al. v. *Commissioner,* 8 B. T. A. 360. (Right to receive royalties on patents.)

Owens Bottle Co. v. *Commissioner,* 8 B. T. A. 1197. (Patent license agreement.)

Mead Cycle Co. v. *Commissioner,* 10 B. T. A. 887. (Leasehold.)

Van Kannel Revolving Door Co. v. *Commissioner,* 11 B. T. A. 1209. (Patent.)

Oahu Sugar Co. v. *Commissioner,* 13 B. T. A. 404. (Lease agricultural land.)

"The right to a deduction for exhaustion of such an asset (leaseholds of sugar cane lands) is not questioned, the Commissioner having acquiesced in the decision of the Board in Grosvenor Atterbury, 1 B. T. A. 169. The parties differ only as to the value of the leaseholds on the basic date" (p. 408).

Ewa Plantation Co. v. *Commissioner,* 13 B. T. A. 625. (Lease agricultural land.)

Hawaiian Sugar Co. v. *Commissioner,* 13 B. T. A. 683. (Lease agricultural land.)

Hershey Mfg. Co. v. *Commissioner,* 14 B. T. A. 867. (Patent application after issuance of patent.)

Western Wheeled Scraper Co. v. *Commissioner,* 14 B. T. A. 496. (Patents.)

Ball & Roller Bearing Co. v. *Commissioner,* 15 B. T. A. 862. (Patent application after issuance of patent.)

Hess Building Co. v. *Commissioner,* 15 B. T. A. 891. (Lease.)

Hotel Wisconsin Realty Co. v. *Commissioner,* 16 B. T. A. 334. (Lease.)

Kensington Water Co. v. *Commissioner,* 16 B. T. A. 630. (Franchise.)

Modern Inventions Co. v. *Commissioner,* 16 B. T. A. 1267. (Patents.)

Farmers Feed Co. v. *Commissioner,* 17 B. T. A. 507. (Patents and contracts.)

John A. Maguire Estate v. *Commissioner,* 17 B. T. A. 394. (Lease of cattle ranch.)

Christensen Machine Company v. *Commissioner,* 17 B. T. A.————(November 19, 1929). (Contract.)

In *Appeal of Manhattan Brewing Company,* 6 B. T. A. 952, at p. 960, the Board of Tax Appeals says:

"The sole purpose of the provision in question is to permit the recovery of the cost on March 1, 1913, value of an asset during its useful life if it is used in the trade or business of its owner. Tangible assets deteriorate with use, and the measure of such

deterioration is readily established by proof of
tain facts. The law recognizes the possibility
exhaustion from other than physical causes an
provides that any allowances on account of wear
tear may include a reasonable allowance for obs
cence. *Patents, copyrights, leaseholds, and sim*
intangibles do not suffer any physical deterioratio
use, but, as their life is limited by contract, they
crease in value or become exhausted by the
passage of years. Ordinarily the annual allowa
for the exhaustion of such property is an aliquot
of their cost or capital value at March 1, 1913, fo
number of years to elapse prior to the terminatio
the contract period, but in extraordinary condit
as with tangibles, the allowance for exhaustion
be increased to include obsolescence." (Italics
plied.)

FILE COPY

Office Supreme Court, U. S.
FILED
APR 14 1930
CHARLES ELMORE CROPLEY
CLERK

Supreme Court

OF THE UNITED STATES

October Term, 1929.

No. 68.

JESSE W. CLARKE, Collector of Internal Revenue for the Twenty-first District of New York,

Petitioner,

—*v.*—

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY,

Respondent.

On Writ of Certorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITION FOR REHEARING.

WALTER W. WELCH,
Counsel for Respondent,
706 City Bank Building,
Syracuse, N. Y.

Supreme Court

OF THE UNITED STATES

October Term, 1929.

No. 68.

JESSE W. CLARKE, Collector of Internal Revenue for the Twenty-first District of New York,

Petitioner,

—v.—

THE HABERLE CRYSTAL SPRINGS BREWING COMPANY,

Respondent.

On Writ of Certorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITION FOR REHEARING.

Comes now the above named respondent, The Haberle Crystal Springs Brewing Company, and presents this, its petition for a rehearing in the

above cause, and, in support thereof, respectfully shows:

1. The cause was decided by the Court on a ground which was not urged by the defendant Collector, and was not considered or discussed in the briefs of either party or upon the oral argument, and was not considered or discussed by the Circuit Court of Appeals below or by the Circuit Courts of Appeals in the cases in point decided in the Third, Eighth and Ninth Circuits, or in the cases decided in any of the District Courts or by the Board of Tax Appeals in passing on the questions involved.

The cause is one of first impression and of interest to a large number of taxpayers. Counsel respectfully suggests that if a cause of first impression is deemed to turn upon a ground not urged by counsel or discussed by courts below or suggested by the Court itself in the course of the oral argument, opportunity should be afforded to counsel to argue such ground.

2. As indicated in the opinion, the decision of the Court rests mainly on the ground that Congress did not intend that brewers should receive compensation for the destruction of their property through prohibition either directly or as "a partial compensation in the form of abatement of taxes otherwise due."

Counsel respectfully submits that the question involved was not one of compensation in any form.

The taxpayer is not claiming compensation in any form for the loss of its property due to prohibition. The question was solely one of determining the true net income of the taxpayer (a brewer) for a period after prohibition had become imminent and turned wholly on the construction of the provisions of the Revenue Act of 1918, particularly Section 234(a)(7). Under that Act the income tax provided for was measured by the net income of the taxpayer. Section 234(a)(7) provided for the deduction in determining such net income of "a reasonable allowance for exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolesence" without any express limitation. The making of an appropriate deduction with respect to property of any character is thus made a matter of the determination of the measure of the tax. The taxes due cannot be determined without first determining the construction of the statute.

To permit such a deduction in determining net income is not to allow compensation. But to deny a deduction to a particular taxpayer actually or prospectively sustaining an admitted loss is to discriminate against and penalize such taxpayer.

Counsel submits that the question should have been decided as a matter of the determination of net income under the language of the Act, not as a matter of the direct or indirect securing of compensation for the admittedly lawful destruction of a business.

3. If the question is properly to be regarded as turning on the construction of the Revenue Act, counsel respectfully submits that the opinion of the Court sets forth no ground upon which the taxpayer, a brewer, is properly denied the benefit of Section 234(a)(7).

The opinion states:

> "It is incredible that Congress * * * should have meant to enable parties to cut down their taxes on such grounds."

Also,

> "Congress cannot be taken to have intended such a partial compensation to be provided for by the words 'exhaustion' or 'obsolescence'."

It is respectfully submitted that, as this Court has often said, the intent of Congress is to be collected only from the words and language of the Act, supplemented, if not plain, by its legislative history, and administrative construction. Nowhere in the Act nor in its history is there expressed any intent to limit the application of Section 234(a)(7) or to deny the benefit of that section to brewers whose property is in fact subject to exhaustion, wear, tear or obsolescence resulting from prohibitory legislation, or any other cause.

In this case, as said by the Court in its opinion, prohibition destroyed the good will value of the business of the taxpayer. There was no dispute

that such destruction was foreseen in the early part of 1918 and took effect in January, 1920.

The contention of the petitioner is not that "exhaustion" or "obsolescence" described the destruction of the business but that from the time when the destruction of the business through prohibition became inevitable exhaustion or obsolescence of the good will property of the brewer occurred. Such property thereafter had a limited useful life and was in the process of becoming exhausted or obsolete.

There is in the opinion of the Court no statement of any reason why the terms "exhaustion" and "obsolescence" do not aptly cover what was occurring to the taxpayer's good will because of prohibition, in exactly the same sense as such terms cover what occurs with reference to patents or leases as their useful life is being exhausted by passage of time. (See Art. 163 of Reg. 45 [1919]).

4. The Court's decision results in great inequality between taxpayers. Substantially all of the cases for 1918, 1919 and 1920 were finally closed before 1927, under Bureau Regulations allowing brewers and distillers obsolescence of good will. In *Brewster v. Gage,* (Jan. 6, 1930), the Court supported its decision confirming the long standing Regulations of the Bureau by stating:

> "A reversal of that construction would be likely to produce inconvenience and result in inequality."

This statement applied with full force to the present case.

II.

SEPARATE AND ADDITIONAL GROUND FOR RE-HEARING.

The findings of fact as made by the Referee upon the trial of this action never have been reversed, modified or set aside by any Court and the whole record containing all the evidence given upon the trial herein, including all said findings is before this Court and is the record upon which this Court reversed the judgment herein of the U. S. Circuit Court of Appeals, Second District.

The taxpayer herein was on March 1, 1913, the owner and holder of 130 contracts (fol. 1648), on January 20, 1918, was the owner and holder of 131 of those contracts and on Oct. 3, 1918, was the owner and holder of 103 of those contracts (See Ref. findings 1150-1151), which said contracts (See contract fols. 1441-1477) gave the taxpayer control of N. Y. State liquor tax certificates and thereunder could transfer them from person to person and from place to place and those contracts so owned and held by the taxpayer were assignable and transferrable.

Those 130 contracts were on March 1, 1913, worth and had a market value of $2500.00 each in all of the value of $325,000.00 (fol. 1152) and the

taxpayer paid as high as $3000.00 for one of those contracts in October, 1913 (fol. 732).

Those contracts and their value were wholly destroyed by the Federal Prohibition Legislation and they were of no value after October 28, 1919, thus indicating an obsolencence of those assets of $325,000.00 (See Ref. findings fol. 1152).

The taxpayer is entitled to a deduction on account of the obsolescence of those contracts, the same as on any other contract, lease or patents and copyrights of limited duration. As to patents, see Kannel Revolving Door Co. v. Commissioner, 11 B. T. A. 1209; Perfect Window Regulator Co. v. United States, 66 Ct. Cl.—, June 18, 1928. As to leases, see Lynch v. Alworth-Stephens Co., 267 U. S. 64, 45 S. Ct. 274, 69 L. Ed. 660; Philip Henrici Co. v. Reinecke, 3 F. (2d) 34 (D. C. N. D. 111); Kaufman-Strauss Co. v. Lucas, 12 F (2d) 774 (C. C. A. 6); Appeal of Grosvenor Atterbury, 1 B. T. A. 169; Appeal of Secor Hotel Co., 7 B. T. A. 158; Hawaiian Sugar Co. v. Commissioner, 13 B. T. A. 683. As to contracts, see International Curtis Marine Turbine Co. v. United States, 63 Ct. Cl. 597; Kentucky Tobacco Products Co. v. Lucas, 5 F. (2d) 723 (D. C. W. D. Ky.); Lassen Lumber & Box Co. v. Blair, 27 F. (2d) 17 (C. C. A. 9); Appeal of Atlantic Carton Corp., 2 B. T. A. 380.

Those contracts are alleged and set up in the complaint herein (fols. 45-49).

The Referee found the deduction for obsolescence of the good will of the taxpayer in the fiscal year 1919 was $89,071.55 and based the taxpayer's judgment thereon (fol. 1120), and this did not include the obsolencence of any of said contracts or their total loss.

That said Referee erroneously refused to find that the taxpayer herein was entitled to an independent deduction on account of the obsolencence of said contracts to which the taxpayer filed exception (fols. 1179-1183).

That the question of the obsolescence of those 130 contracts was not raised in this case in the Circuit Court of Appeals, Second District, by any of the attorneys for either party.

That had the attorney for the Collector herein or had this Court upon the argument raised the question on which it herein reversed the judgment of the Circuit Court of Appeals, Second District, as appears from this Court's opinion written upon such reversal, the taxpayer's attorney could have brought to this Court's attention said contracts and their obsolescence and loss, but on account of the failure of the Court or any one else to raise or suggest the question on which this case was decided the taxpayer feels that he has been deprived and foreclosed of his rights that it would otherwise have had if such a question had been raised or suggested by the Court or any one else.

That in the event that this Court should grant a rehearing herein and on such rehearing should hold that the judgment herein of the Circuit Court of Appeals, Second District, could not be affirmed or upheld on account of the loss of the taxpayer's good will of its business, then and in that event said judgment should be affirmed and upheld by this Court on account of the taxpayer's loss and obsolescence of said contracts independent of the taxpayer's loss of the good will of its business, which obsolescence of said contracts is more than sufficient in amount to uphold and require an affirmance of said judgment.

For the foregoing reasons it is respectfully urged that the petition for a rehearing be granted, and that the judgment of the Circuit Court of Appeals for the Second Circuit be, upon further consideration, affirmed.

Respectfully submitted, Walter Welch.
WALTER WELCH,
Counsel for Respondent.

CERTIFICATE OF COUNSEL.

I, Walter Welch, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay. Walter Welch.
WALTER WELCH,
Counsel for Respondent,
Office and P. O. Address,
706 City Bank Bldg.,
Syracuse, N. Y.

SUPREME COURT OF THE UNITED STATES.

No. 68.—October Term, 1929.

Jesse W. Clarke, Collector of Internal Revenue for the Twenty-first District of New York, Petitioner, *vs.* The Haberle Crystal Springs Brewing Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 27, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

A writ of certiorari was granted in this case on May 13, 1929, on account of a conflict between the judgment below, 30 F. (2d) 219, (reversing 20 F. (2d) 540,) and *Redwing Malting Co.* v. *Willcuts*, 15 F. (2d) 626, (certiorari denied, 273 U. S. 763,) the latter case having been followed by *Landsberger* v. *McLaughlin*, 26 F. (2d) 77, and *Renziehausen* v. *Commissioner of Internal Revenue*, 31 F. (2d) 675, now pending here.

This is a suit brought by the respondent to recover income and profits taxes paid under protest, on the ground, as stated by its counsel, that it was not allowed to deduct from gross income "a reasonable allowance for the exhaustion, including obsolescence, of its good will . . . it having become certain prior to that period that the useful life of the good will would be terminated by January 10, 1920 because of prohibition legislation." The question turns on the Revenue Act of 1918, (Act of February 24, 1919), c. 18, § 234 (a) (7); 40 Stat. 1057, 1078, allowing as deductions, inter alia, "A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." The good will was that of a brewery and is found to have been destroyed by prohibition legislation. The deduction claimed is for the fiscal year ending May 31, 1919, it having been apparent early in 1918 that prohibition was imminent, and the officers having taken steps to prepare for the total or partial liquidation of the Company. The amount of the deduction to be made is agreed upon if any deduction is to be allowed.

We shall not follow counsel into the succession of regulations or the variations in the law before the date of the Act that we have to construe. In our opinion the words now used cannot be extended to cover the loss in this case and it is needless to speculate as to what other cases it might include. It seems to us plain without help from *Mugler* v. *Kansas*, 123 U. S. 623, that when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government, or a partial compensation in the form of an abatement of taxes otherwise due. It seems to us no less plain that Congress cannot be taken to have intended such a partial compensation to be provided for by the words 'exhaustion' or 'obsolescence'. Neither word is apt to describe termination by law as an evil of a business otherwise flourishing, and neither becomes more applicable because the death is lingering rather than instantaneous. It is incredible that Congress by an Act approved on February 24, 1919, should have meant to enable parties to cut down their taxes on such grounds because of an amendment to the Constitution that it had submitted to the legislatures of the States in 1917 and that had been ratified by the legislatures of a sufficient number of States the month before the present Act was passed.

Judgment reversed.

Mr. Justice McReynolds and Mr. Justice Stone concur in the result.